RECORD, CASE No. 13,967.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 309.

FREDERICK GARDNER, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

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1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

Frederick Gardner, of Elkhart, in the State of Indiana, and who is a citizen of the State of Indiana, plaintiff herein, by Orville W. Coolidge and Edward Bacon, his attorneys, filing this declaration in commencement of suit according to the statutes in such case made and provided, complains of the Michigan Central Railroad Company, corporation organized under the laws of the State of Michigan, and especially under act No. 42 of the Session Laws of Michigan for 1846, entitled "An act to authorize the sale of the Central railroad and to incorporate the Michigan Central Railroad Company," approved March 28th, 1846, and the acts amendatory
2 thereof and suppletory thereto.

Said corporation being a citizen of the State of Michigan and being the defendant in this action, which is an action of trespass on the case.

First count. For that heretofore, to wit, on the 17th day of May, A. D. 1882, and for a long time, to wit, more than five years next prior thereto, the defendant was a body corporate as aforesaid, and, so being, was owning and operating a certain railroad commonly called the Michigan Central railroad, and thereupon was using and moving many freight cars and passenger cars and trains thereof in carrying freight and passengers; which railroad extended into and through the city of Niles, in the county of Berrien and
3 State of Michigan.

And in said city, near to the passenger-house of said defendant, with various tracks for the passage of cars, to wit, main tracks, side tracks, and store tracks, did, in an easterly and westerly course, cross a certain road, highway, and street commonly called Fifth street, going in a northerly and southerly direction, said street being broad, to wit, — feet broad, and on said day and for a long time, to wit, more than five years next before then, it was the duty of said defendant, under the statutes in such case made and provided, to have and maintain at the crossing of said railroad and said street a suitable street crossing for the passage of teams by fitting down planks between and on each side of the rails of said tracks, the top of which planks ought to have been at least
4 as high as the rails of said tracks.

And said defendant was then and there in duty bound to have, keep, and maintain said crossing of said street and railroad and said planking thereof in good, sufficient, and safe condition, such that pedestrians, travelers, and employés of said defendant might set their feet upon the same and walk thereover in said street with safety.

And said plaintiff avers that said defendant did a long time prior to said 17th day of May, 1882, to wit, one year prior thereto, place in said street among and between said tracks and the rails thereof

certain planking extending in breadth only a part, to wit, thirty-two feet, of the breadth of said street.

And did wrongfully place in said street to the eastward of
5 said planking permanent obstructions, to wit, certain switch apparatus, frequently rising as much as five feet above the surface of said crossing.

And said plaintiff further avers that a long time prior to said 17th day of May, 1882, to wit, one month prior thereto, a part of one of said planks in said planking in said crossing and next to one of said rails in one of said tracks in said crossing became defective and crushed by the wheel of a car or otherwise, and said crushing and defect in said plank was such that an unsafe and dangerous trap hole, in length a great number of inches, to wit, eighteen inches, and in breadth a great number of inches, to wit, four inches, at one end and tapering so as to almost come to a point at the other end, was left beside said rail and was such as to
6 be unsafe for the feet of pedestrians on said crossing, as they might lawfully be.

And said plaintiff avers that said crushing and defect in said plank was caused by said defendant, through an agent or servant of said defendant, and was left in such unsafe and dangerous condition and without due repair from the time it was made until said 17th day of May, 1882, and until the time of the plaintiff's injury hereinafter mentioned, and was such that prior to said day said defendant became affected with notice thereof, and said plaintiff avers that prior to said day said defendant did have notice thereof.

And said plaintiff further avers that said defendant, not
7 regarding any of its duties aforesaid, wrongfully and negligently left said defective and crushed place and trap hole as it was, dangerous and unsafe, as aforesaid, and unrepaired or in any manner made safe or in proper condition.

And said plaintiff further avers that heretofore, to wit, on said 17th day of May, 1882, at said city of Niles, he was and for a long time prior thereto had been in the employment of said defendant in a certain manner, to wit, as a night switchman, which employment was not very dangerous, and was under the management and direction of certain officers and servants of said defendant superior to said plaintiff and whose directions, orders, and instructions said plaintiff was under obligation to obey and follow, to wit, on said day at said city.

8 And said plaintiff avers that said plaintiff heretofore, to wit, on said day at said city, he being in the service and employment of the defendant as aforesaid, was ordered and directed by one of said superior officers and servants of said defendant, who then and there had full power and authority to give such order and direction, to leave his said employment as night switchman and out of the scope of said employment and, with great increase of risk and hazard to said plaintiff and without any promise or undertaking for any new, additional, or proper consideration or remuneration, to uncouple certain cars, to wit, freight cars under the control of said defendant, to wit, in said street on one of said tracks at said

crossing, which order and direction it was then and there incumbent on said plaintiff as a servant and employé of said defendant to follow and obey.

9 That the plaintiff, then and there, while engaged in obeying and following said direction and instruction of said superior to do said uncoupling and while engaged in uncoupling said cars, to wit, at said crossing as aforesaid, casually and suddenly had one of his feet, to wit, his right foot, caught and held in said trap hole, by means whereof the said plaintiff was unable speedily to extricate his said foot, his feet, his legs and body, and was then and there violently thrown to the ground by motion of one of said cars and the train of cars to which it belonged, and one of his legs, to wit, his left leg, was crushed and injured to such an extent that he, the said plaintiff, was obliged to have and did have his said leg amputated above the knee, and suffered other bodily injuries, wounds, and bruises, causing the said plaintiff to suffer much and

10 long-continued pain and agony and permanent injury, whereby the said plaintiff was made sick, sore, and lame, and so continued for a long space of time, to wit, from said 17th day of May, 1882, hitherto, during all which time he, the said plaintiff, suffered and underwent great pain and was prevented from attending to and transacting his necessary and lawful affairs and business, and was also forced by means of the premises to pay, lay out, and expend and did pay, lay out, and expend a large sum of money, to wit, the sum of $1,000, in and about endeavoring to be freed from his said pains and agonies and to be healed and cured of his said wounds and bruises and in and about having his said leg amputated as aforesaid.

And said plaintiff avers that his aforesaid wounds, bruises, injuries, pains, and agonies were caused by the aforesaid wrongs

11 and neglect of said defendant in leaving said trap hole dangerous and unsafe in said crossing as aforesaid, and by this that said defendant, through its proper officers and servants, required said plaintiff to uncouple said cars as aforesaid, thereby incurring risks beyond the scope of his employment and in manner aforesaid.

And said plaintiff avers that at all times and places aforesaid, until after he received his injuries as aforesaid, he knew nothing of the trap hole aforesaid and always believed that said defendant had done its duty in keeping said planking in said crossing in a proper and safe condition, such that he might set his foot thereon anywhere with safety, and that at all times and places aforesaid said plaintiff was using reasonable care and diligence and was not

12 negligent so as to be justly chargeable with contributory negligence, and that by means of the premises he has suffered damages to a great amount, to wit, twenty thousand dollars.

Second count. Also for that heretofore, to wit, on the 20th day of May, A. D. 1882, at the city of Niles, county of Berrien and State of Michigan, the plaintiff was engaged in the service and employment of the defendant as a night switchman, and then and there the defendant had negligently allowed a certain partly crushed and de-

fective plank for a long time to be and remain in the planking where one of the railroad tracks, to wit, a certain store track or side track of said defendant, did, with other tracks of said defendant, cross a certain street in said city commonly called Fifth street,

13 so that adjoining one of the rails of said store track or side track in said planking in said crossing there was a certain bad and dangerous hole, to wit, a trap hole.

And that while said plaintiff was engaged in coupling cars in the lawful service and employment of the defendant, to wit, in said city, on said day, one of the feet of said plaintiff was caught in said trap hole in such a way that he was unable to extricate it therefrom in time to escape from passing cars in the control of said defendant, then and there in motion, and which then and there violently ran against and over him, crushing, bruising, and otherwise injuring his leg and body, so that he was obliged to have one of his tegs amputated at once, and was then and there otherwise seriously injured in and about his body and limbs.

14 And the plaintiff avers that said injury was occasioned without negligence on his part and through the negligence of the defendant, whereby the plaintiff was then and there made sick, sore, and lame, and was deprived of the use of his said leg and was thereby prevented from attending to his lawful and necessary business from that time hitherto, and has suffered much pain and agony, and has been obliged to pay out and has paid out large sums of money in and about having his said leg amputated and in and about endeavoring to have his sufferings alleviated and his wounds and bruises cured and other injuries then and there received, to the plaintiff's damage twenty thousand dollars.

Third count. Also for that heretofore, to wit, on the first

15 day of June, 1882, the defendant, being the aforesaid body corporate existing and organized under act No. 42 of the Session Laws of Michigan for 1846, entitled "An act to authorize the sale of the Central railroad and to incorporate the Michigan Central Railroad Company," approved March 28th, 1846, and the acts amendatory thereof and supplementary thereto, was owning and operating a railroad commonly called the Michigan Central railroad, which extended into and through the city of Niles, in the county of Berrien and State of Michigan; and in said city, with certain tracks for cars, to wit, main tracks, side tracks, and store tracks, said railroad did cross a certain street commonly called Fifth street, so that then and there was a certain street and railroad crossing, respecting which said defendant was governed by the statutes in such case made and provided, and said plaintiff might well rely on such statutes and have the benefit thereof.

16 And said plaintiff avers that beside and between the rails and the tracks aforesaid in said crossing said defendant had before said day placed certain planking extending in breadth a part of the breadth of said street,

And that said defendant was continually in duty bound to keep and maintain said planking in proper and safe condition, free from unsafe holes.

And said plaintiff further avers that said defendant, disregarding its aforesaid duty on said day and for a long time next before then, wrongfully and negligently allowed one of the planks beside one of the rails in one of said tracks in said crossing to be and remain crushed by a car wheel or otherwise and defective, so that
17 there was an unsafe hole, to wit, a trap hole, beside said rail in said plank in said crossing, to wit, in said crossing in said city, on said day and for a long time next before said day.

And said plaintiff avers that heretofore, to wit, on said day, at said said city, said defendants negligently failed to have said crossing and the planking thereof in a proper and safe condition, free from trap holes.

But, on the contrary thereof, on said day, at said crossing, by means of structures of metal and wood belonging to said defendant, did wrongfully keep and maintain and had for a long time next before then been wrongfully keeping and maintaining on said crossing an unnecessary, improper, unsafe, and dangerous trap hole, of all which said defendant then and there had notice.

And said plaintiff avers that never, till after he received
18 his injuries as hereinafter mentioned, did he have any knowledge, information, or notice of said partly defective and crushed plank or of the negligence and failure of said defendant as aforesaid.

And he avers that, on the contrary thereof, at all the times aforesaid and until after he received his injuries he believed, as he well might, that said defendant was doing its duty as to said planking and crossing and was keeping the same in safe and proper condition and without trap holes wherever said plaintiff did set his foot or did attempt to set his foot on said crossing on said day.

And said plaintiff further avers that heretofore, to wit, on said first day of June, 1882, and for a long time next before then, at said city, he was in the employment of said defendant as a night switch-
19 man under the direction and management of certain superior officers and servants of said defendant, whose orders and directions said plaintiff was then and there under obligation to obey and follow, and under such orders and directions then and there said plaintiff undertook to couple certain cars then at said crossing.

And said plaintiff avers that then and there, while engaged in coupling said cars in a train of cars then at said crossing and under control of said defendant, the attention of said plaintiff being necessarily occupied by such work of coupling and his view being obstructed by said cars, one of said plaintiff's feet was caught and entangled in said trap hole so that said plaintiff was unable to extricate his body and limbs speedily, and he was then and there violently thrown down and shoved along by said train, then and there
20 kept in motion, so that one of his legs was injured and crushed to such an extent that he was obliged to have and did have his said leg amputated above the knee, and he then and there was otherwise bruised, injured, and wounded, and was made sick, sore, and lame, and so maimed for a long space of time, to wit, from said first day of June, 1882, hitherto, during all which time he, the

plaintiff, thereby suffered and underwent great pain and was prevented from attending to and transacting his necessary and lawful affairs and business and was forced to pay, lay out, and expend a large sum of money, to wit, one thousand dollars, for medical aid and attendance, medicines, and care in and about endeavoring to be relieved and cured and in and about the amputation of his leg.

And said plaintiff avers that his injuries aforesaid were occasioned without the negligence of himself and by the negligence and wrong of the defendant, as hereinbefore specified.

21

And that at all times and places aforesaid said plaintiff was exercising reasonable care and diligence.

And said plaintiff avers that, by means of the premises and the wrong and negligence of said defendant, he has sustained damage to a great amount, to wit, twenty thousand dollars.

Fourth count. Also for that heretofore, to wit, on the 16th day of May, 1882, the said defendant was a corporation organized under the laws of the State of Michigan, and especially act No. 42 of the Session Laws of Michigan for 1846, entitled "An act to authorize the sale of the Central railroad and to incorporate the Michigan Central Railroad Company," approved March 28th, 1846, and the acts amendatory thereof and suppletory thereto.

22

And also on said day, to wit, the 16th day of May, 1882, was owning and operating a certain railroad commonly called the Michigan Central railroad, and thereupon was using and moving many locomotives, freight trains, and cars and passenger trains and cars in carrying freight and passengers and did have in its employ many agents and servants, among whom were engineers, firemen, yard-masters, and foremen of car departments; and said railroad being operated by said defendant extended into and through the city of Niles, in said county of Berrien and State of Michigan, and in said city did have what was known as the Miles station yard, and thereon did have for use in moving cars, coupling and uncoupling cars, a locomotive known as the "yard engine," provided with air brakes and managed as was necessary by a competent engineer and fireman; and near to the passenger-house of said defendant, with various tracks for the passage of cars, to wit, main tracks, side tracks, and store tracks, did, in an easterly and westerly course and with a grade descending westward, cross a certain road, highway, and street commonly called Fifth street, going in a northerly and southerly direction, said street being broad, to wit, sixty-six feet broad; and on said day and for a long time, to wit, more than five years next before then, it was the duty of said defendant, under the statutes in such case made and provided, to have and maintain at the crossing of said railroad and said street a suitable crossing for the passage of pedestrians and teams by fitting down planks between and on each side of the rails, the upper surface of which planks ought to have been as high as the top of the rails of said tracks, and said defendant was then and there in duty bound to have, keep, and maintain said crossing of said street and railroad and said planking thereof in good, sufficient, and safe condition,

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such that pedestrians, travelers, and employés of said defendant might set their feet upon the same and walk thereover in safety.

24 And said plaintiff avers that said defendant did, a long time prior to said 16th day of May, 1882, to wit, six months prior thereto, place in said street, among and between said tracks and the rails thereof, certain planking extending in breadth only a part, to wit, thirty-two feet, of the breadth of said street, and did wrongfully place in said street, to the eastward of said planking, permanent obstructions, to wit, switch apparatus and fixtures, generally rising much, to wit, five feet, higher than the surface of said crossing.

And said plaintiff avers that heretofore, to wit, on said 16th day of May, 1882, and for a long time prior thereto, to wit, at said city, the said defendant was in duty bound to employ and have for managing its locomotives on said railroad and in its use engineers who were competent, and to employ and have engineers who were competent men to do the duties for them to do and assigned to them in the employ of said defendant, and to manage the locomotives and cars in their charge, and especially to manage any yard locomotives in their charge or any locomotives, by direction of

25 defendant, used in the place of yard locomotives commonly called yard engines or any locomotives to be used when there was much coupling and uncoupling of cars to be done and much passing and repassing of pedestrians and vehicles.

And said plaintiff further avers that heretofore, to wit, on said day, the said defendant was in duty bound to have its cars which were to be coupled and uncoupled properly constructed and without brake-beams hanging too low or too freely swinging from right to left and without bolts improperly and too much projecting outward.

And said plaintiff further avers that said defendant heretofore, to wit, on said day and for a long time next before then, at said yard, was disregarding all its duties aforesaid, and for a long time, to wit, two months, next before the plaintiff received his injuries aforesaid the defendant wrongfully and negligently had in said plank-

26 ing at said crossing a certain plank so defective, broken, and crushed next to one of the rails in one of the aforesaid tracks that an unsafe and dangerous trap hole, to wit, fourteen inches long and in breadth a great number of inches, to wit, four inches at the eastward end and tapering so as to come almost to a point at the western end, was left beside said rail, and in depth was a great number of inches, to wit, four inches, so that said trap hole was unsafe for the feet of pedestrians on said crossing, as they might lawfully be.

And the plaintiff avers that said trap hole throughout the time aforesaid was wrongfully and negligently by the defendant left in such unsafe and dangerous condition and without repair, and that prior to said day and prior to the time the plaintiff received his injuries, as hereinafter stated, the said defendant was affected with notice of said trap hole.

And said plaintiff further avers that heretofore, to wit, on said

day, at said yard, he was and for a long time prior thereto had been in the employment of said defendant as a night switchman, which employment was not very dangerous; and said plaintiff was
27 under the management and direction of certain officers, agents, and servants of said defendant superior to said plaintiff and whose directions, orders, and instructions said plaintiff was under obligation to obey and follow, to wit, on said day at said yard.

And said plaintiff further avers that heretofore, to wit, on said day, at said yard, said defendant negligently had in its employ on one of its locomotives as engineer and to do all the duties of engineer a young man whose name, as nearly as the plaintiff can ascertain, was Adolphus Walz, but who was commonly called "Pumpkin Walz."

And the plaintiff avers that said Walz was incompetent to be an engineer and was unfit and incompetent to be employed as he was employed by said defendant, and was unfit as engineer to manage a locomotive engine, and that on said day a train of cars (to wit, a passenger train called number eight) drawn by the locomotive managed by said Walz came from the eastward into said yard, and said defendant caused said locomotive with its tender to be taken
28 from said train and the aforesaid yard engine, with its engineer and fireman, to be put in place thereof and to draw said train on said railroad westward, leaving the locomotive on which was said Walz, with its tender and fireman, temporarily to take the place of said yard engine in said yard, and said Walz, in the employ of said defendant, and under the direction of proper officers and agents of said defendant having sufficient authority, was then and there attempting to use the said locomotive as yard engine in said yard where there was much need of a skillful engineer and good management and where there was much coupling and uncoupling of cars to be done and much passing and repassing of pedestrians and vehicles.

And said plaintiff avers that then and there said Walz was unfit and incompetent to act as engineer, to manage said locomotive in what was to be done therewith in said yard, and especially in coupling cars there, and had no sufficient knowledge of the peculiarities of said yard, of all which said defendant then and there had notice.

That said locomotive was without air brakes and was unfit for such use.

And said plaintiff further avers that then and there, he, the said plaintiff, being in the service and employment of said de-
29 fendant as aforesaid and obeying orders and directions of superior officers, agents, and servants of said defendant, who then and there had power and authority to give such orders and directions, the plaintiff, by such orders and directions so coming from said defendant, was caused to leave his said employment as night switchman to set about a very dangerous kind of work, to wit, uncoupling certain cars in control of said defendant at said yard, without any promise or undertaking for any new, additional, or proper remuneration.

And said plaintiff avers that he then and there, seeing that said Walz and the fireman with him on said locomotive must use said locomotive to move the cars so to be uncoupled, requested said Walz to be careful in what was to be done. The cars to be uncoupled being near said crossing on the eastward thereof, said Walz, with his said locomotive to aid in said uncoupling, put them in motion westward; and thereupon the plaintiff, to accomplish said uncoupling in the usual manner, began to step from the north between two
30 of said cars.

And the plaintiff avers that the eastward one of said two cars was an old car, to wit, car number 520, of said defendant, and by the negligence of said defendant had its brake-beam next to the plaintiff in bad condition, to wit, hanging too low, and by the negligence of said defendant had bolts which held the iron shoe improperly, projecting through said beam, to wit, two inches.

And the plaintiff further avers that he then and there properly drew the coupling pin, so that the car west of him was duly uncoupled, and as he stepped back northward, his attention being necessarily occupied by the operation of uncoupling as aforesaid and his sight obstructed by said cars, one of his feet, to wit, his right foot, was suddenly caught and held in the trap hole aforesaid, and while he was endeavoring to extricate the same he was held and obstructed by the coming against his legs of the brake-beam aforesaid with one of its improperly projecting bolts aforesaid, and the plaintiff avers that then and there he threw his body
31 northward and gave the customary signal that the uncoupling was done and that the engineer should stop the car which was coming upon the plaintiff, and that if said engineer had been doing his duty he could have seen said signal and stopped said car, but in place thereof said engineer, by incompetency and negligence, paid no attention to said signal and failed to stop said car as he ought to have stopped the same.

That had said locomotive been provided with air brakes the stopping of said car could have been caused almost instantaneously.

And the plaintiff avers that by negligence of said defendant said car next east of the plaintiff was caused and allowed to keep moving westward a distance, to wit, sixteen feet west of said trap hole; that the lowness of said br*eak*-beam, the improper projecting of said bolt, and the incompetency and negligence of said Walz and the want of air br*eak*s on said locomotive greatly increased the dif-iculties of the plaintiff in and about endeavoring to extricate his said foot from said trap hole and his legs
32 from said place of danger, and that said brake-beam and other parts of said car struck this plaintiff, threw him down, and crushed his left foot and ankle, said projecting bolt plowing up the plaintiff's flesh along his left leg as he was shoved along, injured and mangled, as said car was moving along westward said distance as aforesaid, receiving terrible injuries, a- that thereupon after going said distance westward as aforesaid the said engineer wrongfully and by incompetency and negligence caused said car immediately after coming to a standstill to go back eastward, while the plaintiff's leg was

so held that he received great additional injuries, and one of his bones, to wit, his thigh bone, in said left leg was broken, the aforesaid injuries being such that said plaintiff was obliged to have and did have his left leg amputated above the knee, and he suffered other bodily injuries, wounds, and bruises, causing the said plaintiff to suffer much and long-continued pain and agony and
33 to have permanent injuries and to be sick, sore, and lame for a long time, to wit, hitherto, during all which time he, the said plaintiff, was prevented from attending to and transacting his necessary and lawful affairs and was forced to pay, lay out, and expend a large sum of money, to wit, one thousand dollars, for medical aid and attendance in and about endeavoring to be relieved and cured and in and about the amputation of his leg.

And said plaintiff avers that his injuries as aforesaid were caused by the negligence of the defendant, to wit, on the day aforesaid, to wit, at the yard aforesaid, in said county, in that said defendant, being then and there affected with sufficient notice, did then and there as aforesaid have in the planking at the crossing aforesaid the plank, defective, broken, and crushed as aforesaid, and the trap hole aforesaid, and by the negligence of the defendant in having
34 in its employ as aforesaid Adolphus Walz, commonly called Pum-kin Walz, and in having and using as aforesaid the locomotive without air brakes as aforesaid and the car aforesaid with its brake-beam hanging too low, as aforesaid, and the bolt projecting outward too far through it, as aforesaid, and by the wrongdoing and negligence of the defendant in causing the plaintiff, he being employed as night switchman as aforesaid, to do the uncoupling as aforesaid, outside of the scope of his employment and with great and improper increase of danger to the plaintiff, and by the negligence of the defendant, in that said Walz, being incompetent as aforesaid, gave no attention to the plaintiff's signal as aforesaid and did not stop, as he ought to have stopped, the car that — beginning to crush the plaintiff's leg as aforesaid, and in that said Walz, being incompetent as aforesaid, caused said car to go
35 back eastward, as aforesaid, improperly and negligently, and thereby caused great bodily injury to the plaintiff.

And said plaintiff avers that never prior to the time he received his injuries as aforesaid did he have any knowledge or notice of the aforesaid trap hole or that the plank aforesaid in the planking aforesaid was defective, broken, or crushed, or that the aforesaid Walz was incompetent as aforesaid or otherwise, or that the locomotive which set in motion the car causing the plaintiff's injury as aforesaid was managed by a person incompetent to act as engineer under the existing circumstances, or that the said locomotive was without air brakes, or that the car which immediately caused the plaintiff's injuries as aforesaid was having any brake-beam hanging too low, as aforesaid, or with any bolt projecting too far outward, as aforesaid.

36 And the plaintiff avers that up to the time he received his injury as aforesaid he believed, as he well might, that the planking aforesaid was nowhere defective, broken, or crushed, and

believed that said defendant had done its duty as to said planking and had the same in good, safe condition, so that he, the plaintiff, might safely set his foot thereon anywhere, and so believing the plaintiff relied on the supposed sufficiency of said planking in all respects as he was attending to the uncoupling of cars as aforesaid.

And said plaintiff avers that at all times and places aforesaid he was exercising reasonable care and diligence as he ought.

And said plaintiff avers that by means of the premises and by means of the wrong-doing and negligence of said defendant as aforesaid he has sustained damage to a great amount, to wit, twenty thousand dollars, and therefore he brings this suit.

O. W. COOLIDGE AND
EDWARD BACON,
Plaintiff's Attorneys.

37 [Endorsed.]

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

Narr.

To the within-named defendant:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit a rule was entered in the Book of Common Rules kept by the clerk of said court in his office, in the city of Grand Rapids, in said district, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule or judgment, etc.

Yours, etc.,

O. W. COOLIDGE AND
EDWARD BACON,
Plaintiff's Attorneys.

No. 2227.

To the clerk:

Please file and enter rule. I will pay all clerk's fees.
EDWARD BACON.

Filed March 31st, 1887.
CHARLES L. FITCH, *Clerk.*

I, William Forrest, acknowledge myself security for all costs for which the plaintiff may be liable in this suit.
WILLIAM FORREST.

WESTERN DISTRICT OF MICHIGAN, } ss:
County of Berrien, }

William Forrest, of the city of Niles, in said county, being first duly sworn, says that he has resided in said city for more than fourteen years last past; that he owns unencumbered real estate in said county liable to execution and exceeding in value two hundred dollars; that said real estate is in nowise exempt from sale under execution by reason of any homestead laws.

Further, that this deponent is out of debt and that there is no mortgage on any of his property, and that he is pecuniarily responsible for more than two hundred dollars.

WILLIAM FORREST.

Subscribed and sworn to before me this 30th day of March, A. D. 1887.

THEO. G. BEAVER,
Notary Public, Berrien Co., Mich.

38 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division, March Term, A. D. 1887.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Entered March 31st, 1887.

In this cause, on filing declaration as commencement of suit, pursuant to the statute in such case made and provided and on motion of O. W. Coolidge and Edward Bacon, attorneys for plaintiff, it is ordered that said defendant appear and plead to said declaration within twenty days from the date of service on it of a copy thereof, together with notice of this rule or judgment, etc.

O. W. COOLIDGE AND
EDWARD BACON,
Plaintiff's Attorneys.

39 The Circuit Court of the United States for the Western District of Michigan, Southern Division, March Term, A. D. 1887.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Entered April 21st, 1887.

On reading and filing due proof of service on the said defendant of a copy of the declaration in this cause, together with notice of the rule to plead herein thereon endorsed, as well as due proof that the said defendant has not filed in this cause any plea or demurrer to said declaration, although more than twenty days have elapsed since such service of a copy of said declaration—

On motion of O. W. Coolidge and Edward Bacon, attorneys for said plaintiff, it is ordered that the appearance of said defendant and its default in not pleading or demurring be, and the same hereby is, entered.

O. W. COOLIDGE AND
EDWARD BACON,
Plaintiff's Attorneys.

40 March Term, A. D. 1887.

TUESDAY, *May 10th.*

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

On reading and filing affidavits in this cause, and on motion of Edwards & Stewart, of counsel for the defendant, and after hearing counsel in opposition thereto—

Ordered that the default heretofore entered in this cause be, and the same hereby is, set aside on payment of ten dollars attorneys' fee as costs of this motion, and that the said defendant have one week from the entry of this order in which to plead to the declaration on file in this cause.

41 The Circuit Court of the United States for the Western District of Michigan, Southern Division, March Term, A. D. 1887.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Entered May 16th, 1887.

On motion of Edwards & Stewart, attorneys for said defendant, it is ordered that the appearance of said defendant, by its said attorneys, be, and the same hereby is, entered in this cause.

EDWARDS & STEWART,
Defendant's Attorneys.

42 UNITED STATES OF AMERICA:

The Circuit Court of the United States, Sixth Circuit and Western District of Michigan, Southern Division.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

And now comes the said defendant, by Edwards & Stewart, its attorneys, and demands a trial of the matters set forth in said plaintiff's declaration.

EDWARDS & STEWART,
Attorneys for Defendant.

To O. W. Coolidge and Edward Bacon, attorneys for plaintiff.

GENTLEMEN: Please take notice that under the general issue above pleaded the said defendant will give in evidence and insist in its defense upon the trial of this cause in bar to this action that heretofore, to wit, upon the seventh day of February, A. D. 1884, in the circuit court for the county of Berrien, in the State of Michigan, in a suit brought by the said plaintiff against the said defendant for the same and identical cause of action for which this suit is brought and commenced by the issuing and service of a summons in a plea of trespass on the case, in which suit plaintiff by his declaration filed therein declared against said defendant in a plea of trespass on the case, to which said declaration in said circuit court for the county of Berrien this defendant pleaded the general issue, the said plaintiff upon a trial thereof before a jury recovered a verdict against said defendant, and thereafter and on the 13th day of April, A. D. 1885, upon said verdict recovered a judgment against said defendant, and that on a review of said judgment upon a writ of
43 error in the supreme court of the State of Michigan and at the January term thereof, A. D. 1886, said judgment of said circuit court was by said supreme court reversed and held for naught and a new trial granted upon the ground that upon the facts appearing in the record of said cause the said plaintiff had no cause of action against the said defendant, the record showing that plaintiff's injuries for which he brought said suit to recover damages *was* the result of his contributory negligence and negligence of his fellow-employees, as by the record, proceedings, decision, and judgment of said supreme court more fully and at large appears and which said judgment still remains in full force and effect, and said plaintiff thereafter procured a remittitur of said judgment of said supreme court to said circuit court of the county of Berrien by the filing of such remittitur in the office of the clerk of said circuit court, and thereafter, at a regular term of said circuit court for the county of Berrien, on or about the 29th day of April, A. D. 1886, said cause came on for a new trial at the instance of said plaintiff, Frederick Gardner, and after a notice of such trial by said plaintiff's attorneys by them duly served on said defendant's attorneys and the said plaintiff, by his attorneys, O. W. Coolidge and Edward Bacon, upon the call of said cause for trial voluntarily withdrew said cause and submitted to a nonsuit; which said judgment of said supreme court of Michigan and thereafter judgment of said circuit court of the county of Berrien on said new trial said defendant will insist is *res judicata*.

EDWARDS & STEWART,
Attorneys for Defendant.

[Endorsed:] The circuit court of the United States, sixth circuit and western district of Michigan, southern division. Frederick Gardner *vs.* The Michigan Central Railroad Company. No. 2227. Plea and notice. Filed May 16th, 1887. Charles L. Fitch, clerk. Edwards & Stewart, att'ys for defendant.

44 October Term, A. D. 1887.

TUESDAY, *November* 1, 1887.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

On reading and filing the stipulation of the parties to this cause by their respective attorneys and upon motion of said defendant, it is ordered that this cause be continued for the term upon payment by said defendant to said plaintiff's attorneys of an attorney fee of five dollars as costs of the term.

45 March Term, A. D. 1888.

TUESDAY, *April* 10, 1888.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

This cause coming on for trial, the following jury was called and sworn, to wit: Hiram Bailey, Richard H. Crooks, Hiram Lucas, Enno Pruim, Elijah Blackman, J. V. Armstrong, M. J. Murphy, I. E. Baldwin, Fred. Thomas, M. J. Wrisley, James Pratt, and Edwin Thayer, who sat together in the jury seats and heard the evidence this day adduced.

46 March Term, A. D. 1888.

WEDNESDAY, *April* 11, 1888.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

The jury heretofore empaneled in this cause sat together in the jury seats and heard the evidence this day adduced.

March Term, A. D. 1888.

THURSDAY, *April* 12, 1888.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

The jury heretofore empaneled in this cause sat together in the jury seats and heard the evidence this day adduced.

47 March Term, A. D. 1888.

FRIDAY, *April* 13, 1888.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

In this cause the jury heretofore empaneled sat together in the jury seats and heard the arguments of counsel and the charge of the court and thereupon retired from the bar of the court in charge of S. O. Dishman, an officer of the court duly sworn to attend them, to deliberate upon their verdict, and after having been absent for a time returned again into court and say upon their oath that they find that the said defendant is guilty of the premises laid to its charge in the said plaintiff's declaration, and that they assess the damages of the said plaintiff by reason of the premises at the sum of four thousand eight hundred dollars ($4,800.00) over and above his costs and charges.

And thereupon, on motion of Edwin F. Uhl, of counsel for the said defendant, it is ordered that the said defendant have thirty days from this date in which to move for a new trial in this cause, and that in the meantime all proceedings on the part of the plaintiff in this cause be, and the same are hereby, stayed.

48 March Term, A. D. 1888.

WEDNESDAY, *July* 25, 1888.

The court met pursuant to adjournment.
Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

The motion for a new trial in this cause came duly on for hearing and was argued by counsel for the respective parties, and thereupon the same was taken by the court under advisement.

49 March Term, A. D. 1888.

MONDAY, *July* 30, 1888.

The court met pursuant to adjournment.
Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

The motion for a new trial in this cause having been heretofore argued and submitted, after due consideration thereupon it is now ordered by the court that said motion be, and the same hereby is, granted.

50 October Term, A. D. 1888.

TUESDAY, *October* 16, 1888.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

This cause coming on for trial the following jury was called and sworn, to wit, R. J. Barris, Samuel Holmes, Giles McArthur, George Buzzell, Levi Averill, John M. Waite, Edson P. Gifferd, George Eastman, William H. Coulter, Henry D. Weatherwax, Wilbur C. Scott, and L. T. Bayliss, who sat together in the jury seats and heard the evidence and the allegations of the parties, and thereupon, by direction of the court, without leaving their seats, say upon their oath that the said defendant is not guilty of the premises in the plaintiff's declaration in this cause laid to its charge in manner and form as the said plaintiff hath in his said declaration complained against it; and thereupon it is considered that the said plaintiff take nothing by his suit in this behalf and that the said defendant do go thereof without day and that the said defendant do recover of the said plaintiff its costs and charges by it about its suit in this behalf expended, to be taxed, and that it have execution therefor.

And thereupon, on application of Edward Bacon, Esq., attorney for said plaintiff, it is ordered by the court that sixty days from this date be, and they are hereby, allowed said plaintiff in which to prepare and settle a bill of exceptions in this cause, and that in the meantime all proceedings in this cause, except the taxation of costs, be, and the same hereby are, stayed.

51 October Term, A. D. 1888.

WEDNESDAY, *February* 13, 1889.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } No. 2227.

In this cause it is ordered that the time heretofore granted for the settlement of a bill of exceptions be, and the same hereby is, extended until the second day of April next.

52 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, southern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frederick Gardner, plaintiff, and The Michigan Central Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Frederick Gardner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 21st day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

Seal of the U. S. Circuit Court, Western District of Mich., Southern Division.

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by—
H. F. SEVERENS,
Dist. Judge, West. Dist. Mich.

Nov. 21st, 1889.

53 The United States of America to the Michigan Central Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, A. D. 1890, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, southern division, in which writ Frederick Gardner is plaintiff in error and you, The Michigan Central Railroad Company aforesaid, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error in said writ of error mentioned should not be corrected and why speedy justice to the parties in that behalf should not be done.

Witness the Honorable Henry F. Severens, district judge of the western district of Michigan and holding there the circuit court of the United States for said district, southern division, this 21st day of November, A. D. 1889.

H. F. SEVERENS,
Dist. Judge.

Due service of a copy of the foregoing citation is hereby accepted and admitted, and due service of the foregoing citation is hereby accepted and admitted.

Dated this 4th day of December, A. D. 1889.

EDWARDS AND STEWART,
Att'ys for Def't.

54 [Endorsed:] United States of America. No. 2227. In the Supreme Court. Frederick Gardner, pl'ff in error, *vs.* The Michigan Central Railroad Company, defendant in error. Citation. Filed Dec. 12, 1889. C. L. Fitch, clerk.

WEST. DISTRICT OF MICHIGAN, } *ss:*
County of Berrien, }

Edward Bacon, of the city of Niles, in said western district of Michigan, being duly sworn, says that he know- Edwards & Stewart, within named, and is acquainted with their handwriting, and that their signature to the within admission of service is genuine and was received by this deponent from them by mail.

EDWARD BACON.

Subscribed and sworn to before me this 11th day of December, A. D. 1889.

BELLE CROSS,
Notary Public, Berrien Co., Mich.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, southern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frederick Gardner, plaintiff, and The Michigan Central Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Frederick Gardner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Copy Seal. Justice of the said Supreme Court, the 21st day of November, in the year of our Lord one thousand eight hundred and eighty-nine.

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States
for the Western District of Michigan.

Allowed by—
H. F. SEVERENS,
Dist. Judge, West. Dist. Mich.

Nov. 21st, 1889.

56 [Endorsed:] The circuit court of the United States for the western district of Michigan, southern division. Frederick Gardner, plaintiff in error, *vs.* Michigan Central Railroad Company, defendant in error. Copy of writ of error for the defendant in error. Deposited Nov. 21, 1889. C. L. Fitch, clerk.

57 Know all men by these presents that we, Edward Bacon and Orville W. Coolidge, of the city of Niles, county of Berrien, and State of Michigan, and Spafford Tryon, of the city of Dowagiac, county of Cass, in said State, all as sureties, are held and firmly bound unto the Michigan Central Railroad Company, a corporation existing under the laws of the State of Michigan, in the full and just sum of three hundred dollars, lawful money of the

United States, to be paid to the said corporation, its successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of November, A. D. 1889.

Whereas, in a suit lately pending in the circuit court of the United States for the sixth circuit and western district of Michigan, southern division, between Frederick Gardner, plaintiff, and the said Michigan Central Railroad Company, defendant, judgment was rendered in favor of said defendant, The Michigan Central Railroad Company, and against said plaintiff, Frederick Gardner, thereby making a decision in said suit against said plaintiff; and

Whereas said plaintiff in his declaration in said suit claimed more than five thousand dollars, and more than five thousand dollars was in controversy in said suit, exclusive of interest and costs; and

Whereas said plaintiff, Frederick Gardner, has duly obtained a writ of error and filed the same, together with a copy thereof, in the office of the clerk of said circuit court, to remove the record and proceedings in said suit into the Supreme Court of the United States; and

Whereas said plaintiff has also obtained a citation, directed to the said Michigan Central Railroad Company, admonishing it to appear at a Supreme Court to be holden at the city of Wash-
58 ington on the second Monday of October next, A. D. 1890:

Now, therefore, the condition of this obligation is such that if the said plaintiff, Frederick Gardner, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD BACON. [L. S.]
ORVILLE W. COOLIDGE. [L. S.]
SPAFFORD TRYON. [L. S.]

STATE OF MICHIGAN, } ss:
Western District Thereof, County of Berrien, }

Edward Bacon and Orville W. Coolidge, of the city of Niles, in said county, being each severally sworn, depose and say that each of them has in the southern division of the western district of Michigan property liable to execution to an amount exceeding in value three hundred dollars over and above all his debts and liabilities.

EDWARD BACON.
ORVILLE W. COOLIDGE.

Subscribed and sworn to before me this 23d day of ——, A. D. 1889.

[NOTARIAL SEAL.] CHAS. JOHNSON,
Notary Public for Berrien Co., Mich.

STATE OF MICHIGAN, } ss:
Western District Thereof, County of Cass, }

Spafford Tryon, of the city of Dowagiac, in the county of Cass, and State of Michigan, being duly sworn, deposes and says that he has in the southern division of the western district of Michigan property liable to execution to an amount exceeding in value three hundred dollars over and above all his debts and liabilities.

SPAFFORD TRYON.

Subscribed and sworn to before me this 29th day of November, A. D. 1889.

J. O. BECRAFT,
Notary Public, Cass Co., Mich.

This bond is hereby approved in form and substance this 30th day of November, A. D. 1889.

H. F. SEVERENS,
Dist. Judge.

59 [Endorsed:] United States of America. No. 2227. In the Supreme Court. Frederick Gardner, pl'ff in error, *vs.* The Michigan Central Railroad Company, def't in error. Bond. Filed Nov. 30, 1889. C. L. Fitch, clerk.

60 UNITED STATES OF AMERICA:

In the Supreme Court.

FREDERICK GARDNER, Plaintiff in Error,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant in Error.

Afterwards, before the justices of the said Supreme Court of the United States, came said Frederick Gardner, plaintiff in error, by Edward Bacon, his attorney, and says that in the record and proceedings aforesaid and also in giving the judgment aforesaid there are manifest errors as hereinafter stated, to wit:

I.

The court erred in refusing by the word "refused" the aforesaid request number I on behalf of Frederick Gardner.

II.

The court erred in refusing by the word "refused" the aforesaid request number II on behalf of Frederick Gardner.

III.

The court erred in refusing by the word "refused" the aforesaid request number III on behalf of Frederick Gardner.

IV.

The court erred in refusing by the word "refused" the aforesaid request number IV on behalf of Frederick Gardner.

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V.

The court erred in refusing by the word "refused" the aforesaid request number V on behalf of Frederick Gardner.

VI.

The court erred in refusing by the word "refused" the aforesaid request number VI on behalf of Frederick Gardner.

VII.

The court erred in refusing by the word "refused" the aforesaid request number VII on behalf of Frederick Gardner.

VIII.

The court erred in refusing by the word "refused" the aforesaid request number VIII on behalf of Frederick Gardner.

IX.

The court erred in refusing by the word "refused" the aforesaid request number IX on behalf of Frederick Gardner.

X.

The court erred in refusing by the word "refused" the aforesaid request number X on behalf of Frederick Gardner.

XI.

The court erred in refusing by the word "refused" the aforesaid request number XI on behalf of Frederick Gardner.

XII.

The court erred in refusing by the word "refused" the aforesaid request number XII on behalf of Frederick Gardner.

XIII.

The court erred in refusing by the word "refused" the aforesaid request number XIII on behalf of Frederick Gardner.

XIV.

The court erred in refusing by the word "refused" the aforesaid request number XIV on behalf of Frederick Gardner.

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XV.

The court erred in refusing by the word "refused" the aforesaid request number XV on behalf of Frederick Gardner.

XVI.

The court erred in refusing by the word "refused" the aforesaid request number XVI on behalf of Frederick Gardner.

XVI–.

The court erred in its decision, appearing at the end of the requests of the plaintiff in the circuit court and in words as follows: "The necessity of passing upon these requests is superseded by the giving of the general directions to the jury."

XVIII.

The court erred in directing a verdict in favor of the defendant, as in the bill of exceptions in set forth in these words:

"And thereupon the Hon. Henry F. Severens, district judge, presiding as circuit judge, charged the jury that, in accordance with the opinion of the Honorable Howell E. Jackson, circuit judge, on file in this cause, the said jury must render a verdict in favor of the defendant."

63 Verdict in favor of the Michigan Central Railroad Company.

XIX.

The court erred in instructing the jury that they must render a verdict in favor of the Michigan Central Railroad Company.

XX.

The court erred in rendering judgment in favor of the defendant in the circuit court and against the plaintiff in the circuit court in accordance with the verdict directed as aforesaid.

XXI.

There is error also in this, that by the law of the land the judgment aforesaid ought to have been in favor of the plaintiff in error and against the defendant in error, and the said plaintiff in error prays that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed, overruled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the judgment aforesaid.

EDWARD BACON,
Attorney for Plaintiff in Error.

[Endorsed:] No. 2227. United States of America. In the supreme court. Frederick Gardner, plaintiff in error, *vs.* The Michigan Central Railroad Company, defendant in error. Assignments of error. Filed Dec. 14, 1889. C. L. Fitch, clerk. Edward Bacon, of counsel for plaintiff in error.

64 The Circuit Court of the United States for the Western District of Michigan, Southern Division.

FREDERICK GARDNER, Pl'ff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

The undersigned, the attorneys for the respective parties in this cause, have agreed upon the bill of exceptions and stipulation hereto attached, and request the Honorable Henry F. Severens, as judge of the circuit court, to sign the said bill of exceptions.

Dated October 25th, A. D. 1889.

EDWARD BACON,
Att'y for Pl'ff.
EDWARDS & STEWART,
Att'ys for Def't.

To the honr. circuit or district judge.

65 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

FREDERICK GARDNER, Plaintiff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

In this cause it is hereby stipulated and agreed by and between the attorneys for the respective parties in this cause that the return to any writ of error relating thereto shall consist of a transcript of the declaration and plea with their endorsements and of all the journal entries in this cause in this court, and that to such transcript shall be annexed the original bill of exceptions and assignments of error, together with the bond on writ of error, the writ of error, citation and proof of service, and that the foregoing shall constitute the entire record in this cause for the Supreme Court of the United States.

Dated October 25th, 1889.

EDWARD BACON,
Attorney for Plaintiff.
EDWARDS & STEWART,
Attorneys for Defendant.

66 EXHIBIT H. Apr. 11, 1888. C. H. McGurrin, Stenographer.

STATE OF MICHIGAN:

In the Supreme Court.

FREDERICK GARDNER, Plaintiff, Appellee,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant, Appellant.

Error to Berrien circuit.

Record.

Edwards & Stewart, attorneys for defendant, appellant; Ashley Pond, of counsel; O. W. Coolidge, attorney for plaintiff, appellee.

67 STATE OF MICHIGAN:

In the Supreme Court.

FREDERICK GARDNER, Plaintiff, Appellee,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant, Appellant.

STATE OF MICHIGAN:

Amended Declaration.

The Circuit Court for the County of Berrien.

FREDERICK GARDNER, Plaintiff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

Frederick Gardner, plaintiff herein, by O. W. Coolidge, his attorney, complains of The Michigan Central Railroad Company, defendants, a corporation organized under and pursuant to the laws of this State, heretofore duly summoned to answer the plaintiff in a plea of trespass on the case.

For that whereas, on, to wit, the 16th day of May, 1882, the defendant, being a body corporate under the name and style aforesaid, was the owner of a railroad which it operated, and which railroad extended into and through the city of Niles, in said county of Berrien, with trains of cars running thereon for the conveyance of goods and passengers.

68 And the plaintiff avers that on, to wit, the 16th day of May, 1882, at said city of Niles, he was and for a long time prior thereto had been in the employment of said defendant as a night switchman, under the management and direction of certain superior

officers and servants of said defendant, and under obligation to obey and follow the directions, orders, and instructions of such superior officers and servants of the said defendant; that on, to wit, the 16th day of May, 1882, at said city of Niles, the plaintiff, then and there being in the service and employment of the defendant as aforesaid, was ordered and directed by one of the said superior officers and servants of said defendant, who then and there had full power and authority to make such order and direction to the plaintiff, to leave his said service as night switchman and to couple certain freight cars on a train then at or near the depot in said city of Niles, which order and direction it was then and there incumbent on the plaintiff, as a servant and employé of the defendant, to follow and obey; that the plaintiff then and there, while engaged in the act of obeying said order and direction of said superior officer and servant and in coupling certain freight cars on said train, as aforesaid, had his — foot caught and entangled in a hole at the side of the railroad track of the defendant, caused by the act of the defendant in leaving and having at the side of the rail of the track, where plaintiff then and there was, a plank which at one side had been broken off next to said rail, producing a dangerous cavity into which the plaintiff, while then and there engaged in the line of his duty, as aforesaid, placed his foot without negligence on his part, and which dangerous cavity had existed for some time previous to said 16th day of May, 1882, by means of which the plaintiff was unable to extricate his body and limbs speedily, and was then and there violently thrown to the ground by a passing train and his left leg crushed and injured to such an extent that he, the plaintiff, was obliged to have and did have his said left leg amputated above the knee, and suffered other bodily injuries and bruises; and the plaintiff avers that such injury was occasioned without the negligence of himself and by reason of the negligence of the defendant as aforesaid.

69 Whereby the plaintiff was made sick, sore, and lame, and so remained for a long space of time, to wit, from said 16th day of May, 1882, to the present, during all which time he, the plaintiff, thereby suffered and underwent great pain and was prevented from attending to and transacting his necessary and lawful affairs and business, and was also forced by means of the promises to pay, lay out, and expend and did pay, lay out, and expend a large sum of money, to wit, the sum of one thousand dollars, in and about the endeavoring to be healed and cured of his said wounds and bruises, and was also forced by means of the premises to have his left leg amputated above the knee, to the damage of the plaintiff twenty thousand dollars.

And for that whereas, on, to wit, the 20th day of May, 1882, at said city of Niles, the plaintiff was engaged in the service and employment of the defendant as a night switchman, and that then and there the defendant had negligently left immediately next to the track where the plaintiff then and there was a plank, with a part broken off at one side, next to the rail of said track, thereby causing a dangerous cavity, and that while the plaintiff was engaged in coupling and uncoupling cars in the lawful service and employ-

ment of the defendant on, to wit, the 16th day of May, 1882, his right foot sunk and went into said cavity, and was so caught therein that plaintiff was unable to extricate his said foot from the cavity so caused in time to escape from passing cars, which then and there violently ran against and over him, crushing, bruising, and
70 otherwise injuring his left leg and body so that he was obliged to have his said left leg amputated at once, and was then and there otherwise seriously injured in — about his body and limbs; and the plaintiff avers that said injury was occasioned without negligence on his part and through the negligence of the defendant.

Whereby the plaintiff was then and there made sick, sore, and lame, and was deprived of the use of his said left leg, and was thereby prevented from attending to his lawful and necessary business from that time since, and has been obliged to pay out and has paid out large sums of money in endeavoring to be healed and in having said left leg amputated, in the sum of, to wit, one thousand dollars, and other injuries then and thereby received, to his damage twenty thousand dollars.

O. W. COOLIDGE,
Attorney for Plaintiff.

H. H. COOLIDGE, *Of Counsel.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Berrien.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

And now comes the said defendant, The Michigan Central Railroad Company, by Edwards & Stewart, its attorneys, and demands a trial of the matters set forth in the plaintiff's declaration.

EDWARDS & STEWART,
Attorneys for Defendant.

71 STATE OF MICHIGAN:

In the Supreme Court.

FREDERICK GARDNER, Plaintiff, Appellee,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant, Appellant.

Bill of Exceptions.

The Circuit Court for the County of Berrien.

At a session of said circuit court, continued and held at the courthouse, in the village of Berrien Springs, in said county, on the seventh day of February, A. D. 1884, before the Hon. Andrew J. Smith, judge of the second judicial circuit, before a jury, this cause

came on to be tried, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys.

Upon the trial of the issue aforesaid the plaintiff's counsel called and examined as a witness for the plaintiff FREDERICK GARDNER, the plaintiff, in his own behalf, who, being sworn, testified that he had lived in Niles 18 years and was 45 years of age, and had been in the employ of defendant continually 12 years, and quit defendant's employ 16th of May, 1882. First worked for defendant
72 on a gravel train; then worked under Mr. Gregg, freight agent, in the freight-house in Niles 10 years hauling wood and helping in the freight-house; next worked for Mr. Bachelor, yard boss, six months, whose business it was to oversee the trains and to see that trains did not lie in yard too long and that the work was done when trains came in, and to see that the men attended to their work—all such as that. Witness was employed as night switchman six months from six in the evening till seven in the morning; was employed mostly at the east end of the yard—from Fifth street east. From the 7th of May, prior to the time he left, to the 16th of May witness helped to make up trains in the morning when he had nothing to do of his own work; his own work was to tend switches for trains from the East and West and see that they got water and went out, and see that he had the switches right; when his work was done he had orders to help the boys in the yard to make up trains.

Q. From whom did you receive those orders?

A. From Mr. Bachelor.

Counsel for defendant objected to the answer as hearsay, irrelevant, and immaterial, and moved to strike it out. Motion overruled, and defendant's counsel excepted.

Witness testified that he received those orders on the 7th day of May, about half past 6 o'clock.

Q. You may state what Mr. Bachelor said to you there.

COUNSEL FOR DEFENDANT: Same objection; irrelevant and immaterial.

Objection overruled, and defendant's counsel excepted.

A. On the 7th day of May, in the evening, as I went to work after I got my lantern, the train came, and I went from the baggage-room up to the water tank and jumped on the water tank; Mr. Bachelor came on the south side and turned the water pipe and turned the water on and waited until I came down; then he said to me,
73 "Fred., I want you to help the boys in the morning." He says, "John"—that is, John Walker—"goes down to the west end; that leaves John Etzcorn alone, and he cannot do the work alone; I want you to help him." I says, "All right." I says, "You told me once that I should not do this work; I had nothing to do with it." "Well," he says, "I cannot help it now; the trains don't get off in the morning; the South Bend train is late pretty nearly every morning; we have not got men enough to get the cars

ready; you must help him." I said, "If that is the case that I must help him, I suppose I will have to do it."

Counsel for defendant moved to strike out all the preceding conversation on the ground that it is hearsay, irrelevant, and immaterial. Motion overruled, and defendant excepted.

Witness testified that from that he went on and helped the boys every morning until the accident—that is, when he had no work of his own; that there was no train that morning and he had no work of his own. Bachelor had had charge of the yards, as near as he could judge, five or six years; was employed by defendant; was under Mr. Bachelor, who employed him as night switchman, and he continued under him till the 16th of May, 1882. From the 7th of May he helped the boys in the morning make up the trains, turned the switches, helped them couple the cars, let trains out and in from the West and East and gave them water. Bachelor was present pretty nearly every morning from that time on, and made no objection to his work. On the morning of the 16th of May, 1882, about half past four, the way-freight came in from the West, and witness turned the switch to let her go on the other track. John Walker, a night man, jumped on the engine and went down to west end, and witness went over on the south track where the train stood with four cars. Witness told the engineer to be careful, that
74 he was going to help John to switch the train; then pushed down over the crossing toward the west. John had one cut off and got on top to hold it. This was John Etzcorn, night boss under Bachelor. Witness testified further: "I asked him where he wanted the other."

Counsel for defendant objected to the conversation as irrelevant and immaterial.

The court ruled that the testimony objected to was a part of the *res gesta* and admissible to show whether witness (plaintiff) was guilty or not of contributory negligence.

Counsel for defendant excepted.

Q. Go on and tell what happened.

And witness testified that John said to his question to him, "one in and one out," meaning one on the freight-house track and one on the south side; that he, witness, set the switch over and motioned the engineer ahead and stepped in. There were four cars ahead of the engine to the train. The engine was backing up, pushing the cars ahead of her. Witness stepped in there, he should judge, about six feet above the crossing, his left foot inside and right foot out; put his right hand on the edge of the car, pulled the pin with the left and laid it upon the deadwood, a block that is in front that the iron bolt goes through to hold up the draft irons; that as he had the pin pulled ready to step out to bring his left foot outside the rail after he had set it down he went to lift his right foot and it was fast. He stooped over and looked back to his foot where it was fast in that hole under that plank, took his left foot and set it back on top of the rail right by his right foot. He didn't

know but he could pull it out, but didn't have time enough to do it, and the car caught him in the back, and the brake caught him in here and threw him down and shoved him 16 feet before he stopped. Mr. Etzcorn heard him hello, and jumped off the car and helloed for them to stop. They pulled the train back and witness turned over on the crossing and sat up. The hole was on the
75 east end of the plank, the north rail of the south track. Fifth street crosses there, running north and south, at the east end of the depot; same kind of rail as that is. These plank were a foot wide, four inches thick, with ties under them. The hole, from what he could see of it, was in shape of a bootjack; what he could see at the time. It pushed him down. Of course he could not see exactly; saw most of it after he sat up; that the hole was open then. When he was fast his foot was under it; couldn't see anything of his foot only his instep. The crossing is 32 feet long, two lengths of plank, the plank 16 feet long. The hole was on the northeast corner; a good deal of travel done over it. No passengers hardly ever went over there; they went over Fourth street. This was the north rail on the south side, and hole was on the east end. After he was injured he was taken to the Saxe house and from there home. Two physicians were at the depot, who were sent for, Belknap and Bonine, who amputated my leg at the house; was insensible at the depot for about half an hour; was confined to the house about ten weeks; not under the surgeon's care more than four weeks; was not able to do any work; not until the first of August, 1882, that he did any work; was getting $45.00 at that time from defendants. For first two weeks Dr. Bonine, after that his wife, dressed the wound; never noticed this hole before the injury; didn't know it was there; had no chance to know it was there; worked nights and slept daytimes. On the 16th of May, 1882, Mr. Doliver's position was second roadmaster.

Said witness, plaintiff, testifying on his own behalf, on his cross-examination by counsel for defendant further testified as follows:

On the 16th day of May, 1882, had been in the employ of defendant at Niles Station 12 years; was familiar for the last years back with the station grounds there. In the spring of 1870 went into employ of defendant on gravel train from Pokagon to New
76 Buffalo; first he used the shovel about three months, then was promoted to brakeman, and was brakeman until he went to work for Mr. Gregg, in 1872; worked on gravel train, he thinks, about nine months. Mr. Gregg was then and is now station agent. Gregg had at that time general supervision of the employés at that station, the control of the yard and freight-house. Bachelor was not there when witness went there; he came afterwards; worked for Mr. Gregg until October or November, 1871. His duties were to haul wood with a horse and wagon to the stands to wood up the engines; to help get water; to help load flour from freight-house into cars. The wood-stands were, one east and one west of the passenger-house—one where the stand-pipe now stands, another across from the west end of the stands; hauled the wood generally

from the yard. Toward last years hauled some of the wood from out the cars, and in doing this had to cross and recross the tracks; sometimes lengthwise of the tracks; didn't attend switches during that time without he was ordered; hadn't at that time done any coupling and uncoupling of cars; did in a few years afterwards and while in Gregg's employ, who would frequently send him to do it in other men's places; had to fulfill when he was told to do it; was employed by defendant as a general hand about the yard, freight-house, and switches and became familar with the business and tracks at Niles. He was always careful. The business with some people is a dangerous business; generally should think it a dangerous business if a man does not look out what he is doing. His business, when hurt, was that of switchman, and there was no danger about that. When hurt, I was doing what I was told to do. Mr. Gregg on May 16th was in employ of defendant and had general charge of the station, but not the yard any more, and only knows that Gregg didn't have charge of station because he didn't hire him, witness. Gregg never gave him orders after he,
77 witness, left the freight-house. Gregg never frequently told him not to undertake to couple cars; never did but once; that was February 17th, 1882; was helping a brakeman one morning to hold a car; the engineer pulled the lever back and let engine run back and caught him. Bachelor and Gregg came and told him that was not his business; that he should let the car go and let the brakeman attend to it.

The 16th of May an engine with a freight train and four cars ahead of it came from the east; pulled them out of freight-house with switch-engine; four cars on the train; had been five; Etzcorn had cut one off; was about the length of the building from that engine and cars when he first saw them that morning; came from the west, going to the east; witness stood east of Fifth-street crossing tending switch for way freight to let them out; came up the track to get onto another so she could go down to the west end turn-table; they turn around, and that engine goes west again.

In addition to the engine handling the five cars another engine came into the yard that morning with a train of cars from the west; it went no further; engine turned around there and went west to the turn-table about five minutes before witness was hurt.

The conversation Bachelor had with witness on the 7th of May was the last conversation had by him with witness with reference to doing work, and that was all of it. There was a switch just east of the crossing on Fifth street which he tended and had tended more or less from the time he went to work nights. This switch arm or handle was about ten or twelve feet east of the east end of the plank on that crossing; some nights would not have to handle that switch at all; then again have to handle it every five or ten minutes; can't tell how long it was before he was hurt that he handled that switch; might have handled it that night; it was a switch that was frequently handled.

78 The time he got hurt was half past four o'clock in the morning; not sure it was not half past five; he afterward

made a report of the accident and sent to the company; don't remember whether he reported that it was five thirty in the morning; the report he made of it was correct; the matter was then fresher in his mind than it is now.

A paper is here shown to witness, and witness testified that the paper was the report of the accident he made to the company and the same marked "Exhibit A," and so much of the report as states the time in the morning when the accident happened offered in evidence.

Witness further testified: The rails south of, adjoining, and parallel with the plank where he was hurt were movable at the east end with a switch-bar. There were bars across underneath to hold the north and south rails in place, fastened to the rails with a clamp at each side. The east bar run up to within about six inches of the plank. Witness couldn't say whether when the switch was thrown south it moved the rail away from the plank on the north side of it; he never paid attention, never noticed; the switch-bar attached to these rails might have been ten or twelve feet east of the east end of the plank; should judge should have to move these rails south to join with next rails in switching about three inches, and moving that end three inches would not move the rail at east end of said plank, but could bend two bars of iron like that with the switch and make that coupling; this switch generally used for South Bend track; it was a store track used for storing cars and occasionally to switch them out and into the freight-house; South Bend cars in use every day and required considerable use of that switch.

Witness' work commenced at six o'clock at night and ended at seven in the morning. Saw Etzcorn first that morning about five minutes before he, witness, was hurt; he was coming out of
79 freight — with five cars an- engine; he cut of- end car and got up to hold it; witness spoke first to him—asked him where he wanted those cars; he said "in and out;" witness set the switch over *over* for the freight-house and motioned the engineer ahead and stepped in to pull the pin; pulled the pin and laid it upon the deadwood; then went to lift his right foot and it would not come; he hadn't before been to that switch that night; had no difficulty in discovering Etzcorn on the car; was about the length of the court-house away from him when they came up, and he turned the switch for the engine to go west; this car that witness claimed to have uncoupled was to be put into the freight-house; pulled the pin of this car—west end of the car from which he took this car; should judge about six feet from the west end of the crossing when he stepped in to pull the pin; first car standing almost on the crossing, a little bit over, about six feet over, when he went in.

Q. So that you were at no time nearer than six feet to the east end of the crossing?

A. I went back two steps.

Q. How many steps? I mean the planking on the crossing, of course.

A. I never took only one; just set my left foot.

Witness further testified: This was within six feet west of east end of plank, should judge; didn't measure it; witness couldn't see where the plank ended and common dirt began at that time; couldn't pay any attention; had to watch his fingers and not get them pinched; can't tell distance of west end of this planking from east end of switch that goes into freight-house; should think it three or four rods; when he cut this car off he was six feet from the east end of the plank; it was so light you could see pretty good; if he had known of the defect in the plank he could have seen it; if he didn't have any fingers to watch he could have seen it, but he was inside of the track, his right foot on the outside of the track; the
80 kind of car it was he took this car he cut off from was an old Mich. Central car; can't tell what time sun rose on the 16th of May; it gets quite light before sun is up; can't tell how long before sun is up; can see objects within a radius of 15 or 20 feet; maybe half an hour; was facing west when he uncoupled this car; operated the *the* pin with left hand; put pin on the deadwood of the car that went into the freight-house; then started to walk in same direction he was facing, the cars back of him moving in same direction; the brake-beam of the car immediately back of him did not catch him and carry him down; after he was caught the car struck him on the shoulders first and threw him forward his whole length; was shoved 16 feet; know length of plank was in center of the crossing where he sat up; Mr. Etzcorn, the first man there, first spoke to him; saw Mr. De Rosier some time after he was injured; don't know how long after; talked with him, but not in reference to this matter, not a word.

Witness guesses he told De Rosier how he was injured; don't know as he did; that's more than he can tell, so many talked with him; could not tell the day De Rosier was there; could not tell whether it was the 19th day of May or not; at this time did not tell De Rosier this, or this in substance; that he could not tell how he was caught or injured, but that he thought he would help the boys out that morning, and in doing that he got hurt; didn't have any talk whatever with De Rosier about his injury and way he received it, as he knows of; if he had gone there where he claimed this defect existed, he could have seen it if he had gone on purpose to look.

By the COURT:

Q. If he was there without going purposely to look for it, could he have seen it?

A. If I had been there without going there on purpose I could have seen it.

Witness further testified that he could go by it a hundred
81 times and not see it, and further testified that it was of such a nature if his attention was not called to it that he could not have seen it; that he knew of no defect in the plank and there was no defect so far as he discovered; that so far as he knew it was a good and proper crossing for the purpose and place; never saw any defect; never called the attention of the company or any officer of the company to any defect of that kind.

That crossing was a highway crossing. He always thought it properly kept and cared for.

On his re-examination by counsel for plaintiff said plaintiff testified that when he attempted to uncouple the car he was some six or 8 feet east of where his foot became fastened. The cars were in motion when he attempted to uncouple them.

Q. Will you now state and show the jury more definitely what you did?

Objected to by counsel for defendant upon the ground that same kind of construction has been brought in and placed before the jury, and counsel says what it is. I don't know. It has been there since the trial commenced, and I apprehend from the nature of the question that there is some explanation to be given, and so far there is nothing in the case that makes what they have brought in here an exhibit. I ask to have it moved from the room and from the presence of the jury.

The COURT: He went on and stated that this represented the north rail of the south track, and this wood, as I understood, was to represent that there was a hole there.

COUNSEL FOR DEFENDANT: Do I understand the ruling to be that this piece of wood and iron may remain here?

The COURT: I don't see any objection to its remaining; it has been testified to.

82 Witness further testified that when he attempted to uncouple the cars the cars were in motion, going west. He moved along as the cars moved; was ready to step out when he got opposite where his foot got fastened; went to bring his right foot out, and it was fast; then set his left foot back on top of the rail; thought he could lift his right foot and pull it back.

COUNSEL FOR THE DEFENDANT: I object. He is using that thing to explain what he did. I certainly have a right to have it in or out of the case.

By the COURT: You may call it in the case.

Witness further testified that when he found he was fast he looked back to see where his foot was; didn't know what held it; saw where it was and took his left foot and set it on top of the rail, thinking to have time enough to pull his right foot back and out, but didn't have time. The cars took him in the back about the time he was bending over the brake; caught him and pushed him down.

This rail was on the north side of the south track and movable at the east end. That switch had not been used that morning. To operate the switch on the east end of the rail—on the west two or three feet of the rail—it would have had the effect of moving it if it was fastened here; should judge this rail ten or twelve feet long; don't know how far from the west end of the rail it was where his foot became fastened; don't know where the join was at the west end; might have been right by it; might have been six inches away; if the switch had been ten feet from where his foot became fast,

couldn't tell how much it would have moved the rail at that point; don't know as you could discover that it moved it any. He understands it as he saw it. His foot went under the plank; could not see any heel at all. He got up and saw a splinter lying east of him where his foot had come up and pulled a piece off.

Q. Will you state to the jury whether, after the accident, you suffered pain?

83 A. Yes, sir.

Objected to by counsel for defendant as immaterial and irrelevant. Objection overruled, and defendant excepts.

The pain was great during the time it was healing up; not as bad as it has since been.

Q. State whether you suffer pain now from the accident.

Objected to by counsel for defendant as immaterial and irrelevant. Objection overruled, and defendant's counsel excepts.

A. I suffer more pain since it healed than I did while healing.

Said witness on his recross-examination by counsel for defendant testified:

Q. I understand you now to say that you were about six feet east of this planking?

A. Yes, sir.

Witness further testified that the cars were moving when he started to go in to uncouple them; they had just started, and he walked along until he came to this plank, and his foot went under it in that hole in the plank; next to the rail from the plank to the ground there is a step down the thickness of a plank. He took his left foot and set it back on top of the rail, thinking he could pull his right foot out, but was unable to do it.

Q. Now, what did you mean when you swore before dinner that you was not nearer than six feet to the east end of this plank?

A. I mean that I was within six feet of the crossing when I stepped in to uncouple the car.

Q. What did you mean when you said that you was not nearer to the east end of this planking than six feet when you undertook to uncouple the car?

A. I mean that I stepped in to pull the pin and get that car off.

84 Q. When you undertook to do that you was six feet west of the east end of this planking?

A. Six feet west.

Q. What did you mean when you swore before dinner that you was six feet west of the east end of this plank?

A. You made a mistake—that is wrong.

Q. Who called your attention to that mistake?

A. I didn't say west end. I said east end.

Q. Who called your attention to that mistake?

A. I don't know as I made any.

Q. If you stated on your direct examination before dinner that you were six feet west of the east end of this plank, was that true?

A. I didn't say so. I say the east end.

Witness further testified that he had not said a word to his counsel or to anybody about this part of the case since testifying before dinner.

Q. Do you mean to say that you have not talked with your counsel about that part of the case as to where you started to uncouple the cars?

A. I told you the distance I thought I was from the end of the plank when I stepped in when the train was in motion.

Witness further testified that the train was not backing; the engine was going ahead west and was pushing the cars ahead of it; that there is no injury now to his right foot; at the time it hurt him some—strained a little; don't know as I ever showed it to anybody.

Q. Now, sir, if your foot was caught in the condition you say it was, why didn't you throw yourself right over north?

A. I did try to as much as I could. You have both feet fast you cannot throw yourself.

Witness further testified that he had one foot fast and the
85 wheel caught his left foot and turned it bottom side up; that the brake caught him here and turned him in that shape—turned his foot bottom side up. The first place struck was in the shoulders; his left foot then was on the rail.

COUNSEL FOR DEFENDANT: I understand you offer this (counsel refers to the exhibit used by plaintiff to illustrate the shape and position of the hole, the rails, and the cars) as an exhibit.

COUNSEL FOR PLAINTIFF: We say nothing. It is not necessary that we should.

Counsel for defendant desires to know of the court whether it is in the case or out of it, and asks to have it removed.

By the COURT: The sheriff will take it away.

Counsel for defendant asks the court that all the testimony given, as illustrated by that implement, be stricken from the case; to which counsel for the plaintiff objects.

By the COURT: A thing may be introduced for one thing and not for another. It was introduced here for the purpose of showing the position of the rails in relation to the cars; that is done with. If they don't propose to use it any further set it away, that is all.

Witness further testified that between the rails it was all planked over and of the same height as the plank outside the rails.

Q. Do you say that this exhibit that has been taken out represented the hole your foot got into?

A. It is as near as I could make it; it might have been a little longer or a little bigger; I don't think the hole on top was quite as long. (This exhibit in the possession of plaintiff is here referred to and its production demanded.) Witness testified that he laid the plan of it; sawed the boards off and nailed them together; made it from his recollection; nobody assisted him, only his brother-in-

law got the nails for him; the only time he ever saw the hole was after he pulled his foot out of it—after they pulled him
86 out; the only view he got of it was after they pulled him out; he had his senses so he could see it; he was 16 feet west of it sitting up; that is the only time he ever saw it.

On the trial of said issue, the plaintiff called as a witness Dr. BONINE, who, being sworn and examined, testified that he was a physician and surgeon residing at Niles; had practiced his profession 28 years; that he was called to attend the plaintiff in the month of May, 1882, at Saxe house.

Q. You may state the condition you found him in.

Objected to by counsel for defendant as immaterial and irrelevant. Objection overruled, and counsel for defendant excepted.

A. I think I found him on a stretcher, and his leg was badly crushed from the calf of the leg up to the middle of the thigh—completely torn to pieces.

Witness further testified that he took him to his house and amputated the leg; amputated it high up in the thigh, and because his leg was destroyed; he was pretty badly used up; witness had his doubts about his living through the operation; there had been profuse hemorrhage; cannot tell how long he attended him; know he got well pretty soon for an injury of that kind; it was several weeks; visited him frequently.

Cross-examination of Dr. BONINE by counsel for defendant:

Witness testified that he made a general examination of the plaintiff and his condition at that time; discovered no injury to either foot; the boot was on the foot he amputated; don't remember of having seen any injury to the other foot; the injury to the leg seemed to be from the calf of the leg up; it was ground all up; scarcely held together.

D. B. COOK sworn and examined as a witness for the plaintiff, and testifies that he knows the plaintiff; remembers of hear-
87 ing of plaintiff's injury in May, 1882; went to the depot that morning pretty early, when he first heard of it; was editor of a paper, and was after items; went to place where they said injury occurred on Fifth street, he thinks; didn't take particular notice about that; noticed the place they pointed out where he received his injury, and put his foot in same place, together with others.

Defendant's counsel moved to strike out as hearsay and as conclusions of the witness this testimony of the witness. Motion overruled, and defendant's counsel excepted.

Witness further testified that he didn't take very particular notice of the place which was pointed out to him as the place where plaintiff caught his foot; thought it was on the north side of the iron rail, between the plank and the rail; witness put his foot where they said he put his and tried to pull it out, but found it was a little difficult, but could take it out by taking a little time.

Q. Describe the shape of the hole, as near as you can.

A. I saw this representation here; it appears to me that the wood comes up to the rail a little too quick; it appears to be a little bit too wide, still I am not prepared —. I didn't take any very particular notice of it. I hurried up to the wounded man as quick as I could to see the amputation; didn't take particular notice whether it was at the east end of the plank; think it was a little east of the center of the crossing and about the edge of the crossing, as near as he can recollect, where there was blood; can't tell who was there; think Mr. Shockley and I went up together.

The witness, D. B. Cook, on his cross-examination by counsel for defendant, testified that he attempts to illustrate a part of his testimony by something similar to what he has seen here; don't think it was quite a correct representation.

The thing used in evidence by plaintiff as a representation to illustrate the place and manner of the injury was here brought back by request of defendant's counsel and witness further testified:

88 Q. Now, Mr. Cook, where did you place your foot in reference to that plank?

A. My impression is, it is a little too wide here; still, witness says, he didn't take very particular notice; he set his foot in there; was facing east; don't think he tried to put his foot in facing west.

Q. Did you understand at that time that the car that injured Mr. Gardner was going west?

A. I didn't understand much about it any way; hurried up to his house as quick as I could.

Witness further testified that he put his foot in there the way he has testified to so that the end, he thinks, came over the foot, but is not certain; didn't take particular notice of it; don't know about the east end of the plank; it seems to him that there was no east end and can't tell where it was if there was; couldn't tell whether the hole was at the centre of the plank or at the east end of it; all he can tell is that he put his foot where they said he put his; this, if his recollection serves him right, was on Fifth-street crossing.

CLEMENT SHOCKLEY, sworn and examined as a witness for plaintiff, testified that he lives in Niles; is acquainted with plaintiff, and remembers of his getting hurt in May, 1882; was at the depot that morning with witness Cook; went to the Saxe house and from there to Fifth street, crossing south track; saw the place where they said he got hurt—got his foot fast; witness tried it; the plank was split off longer than that (referring to the model produced); it came up to a point like that; witness slipped his foot in there; nobody around but the yardmen to see how my foot would fit in it, to see if it would get fast; it did get fast; put it in from the east, facing west, and Mr. Cook did same thing afterwards; should think it was such a rail as that on north side of the track, east end
89 of the plank; workmen were obliged to be there back and forth a good deal of the time; noticed, a little way off west of there, blood; went there that morning about 7 o'clock; think Etz-

corn and Line were there; don't just remember all yardmen; didn't notice any splinter there then; saw plaintiff that day after his limb was taken off.

Said witness, Clement Shockley, cross-examined by counsel for defendant, testified that he had lived at Niles 21 years and had known plaintiff 16 years; plaintiff is a brother-in-law of mine; went there that morning, having heard he was hurt; went with witness Cook about 7 o'clock; discovered this break in the plank; shoved his foot in west from the east; couldn't pull it straight out.

Q. Suppose you just put your foot in there and illustrate to the jury how you done it.

A. It was wider than this, because my foot would not go in here. I put it in in that shape.

Q. Now, just right forward; can't you pull it up?

A. No, sir.

Q. Was it beveled underneath like that?

A. Yes, sir; it was not beveled with an axe like that; there was a rotten plank had broken off and went back like that.

Witness further testified he went up there for nothing but to see plaintiff; didn't contemplate being a witness; if he had, should have taken more notice; did not take notice particularly; didn't put his foot in and try it only once; Mr. Cook was there and several men around; couldn't say who; have talked the matter over with plaintiff and have undertaken to describe to him just what he, witness, saw up there; had no disagreement with him as to what it was; told him more minutely than he knew just the condition the plank were in. He thought it was not as long as witness thought it was; the split off was not as long as witness thought it was; witness
90 did not assist him to make this exhibit; was in the buggy in which it came; first saw it this morning; had no talk with plaintiff about getting it up in any way.

CHARLES REAM, sworn and examined as a witness for plaintiff, testified that he has been in employ of defendant several years off and on; can't tell how many years altogether; was in defendant's employ in May, 1882; remember the day plaintiff was hurt; was there in defendant's employ; his business just working around the station in the yard; his attention was not called to the place where plaintiff was hurt; went to crossing on Fifth street that day and noticed the plank where there was a hole; was on his way home; noticed a hole in the plank on the northeast side of the plank, Fifth-street crossing; can't describe it—was so long ago; have mostly forgotten how it was; was on the northeast side of the south track on the east side of the plank; can't tell how long was the hole; didn't take particular notice of it; should think between 7 and 8 inches; don't know how wide at the east end; didn't put his foot in it.

Q. Do you know what was afterwards done with that plank where the hole was?

Objected to by counsel for defendant as irrelevant and immaterial. Objection overruled, and counsel for defendant excepted.

A. I chopped them off.
Q. When did you do that?

Same objection by counsel for defendant. Objection overruled, and defendant excepted.

A. I could not tell; a couple of days after.

By the COURT: If the plank was perfectly right there was no necessity for taking it up, I should judge.

Counsel for defendant also excepts to statement made by the court.

91 Witness further testified that he didn't remember now whether the plank at that time on the north side was beveled at all or came right up square.

Q. State whether you were directed (this chopping off the plank) by anybody; if so, who.

Objected to by counsel for defendant as irrelevant and immaterial. Objection overruled, and defendant's counsel excepted.

A. I was directed to by my foreman.

Witness further testified that the foreman was Mr. Perine, foreman of the trackmen working in the yard at that time; guessed he had not noticed the hole before; had been across the track there several times and never noticed it.

Said Charles Ream on his cross-examination testified that he is not now in the employ of the defendant. His position was that of common laborman on the track and around the yard; don't know whether he was working around that point that day; had been before that; prior to the accident had not heard of or seen this break in the plank.

JOHN LINO, sworn and examined as a witness for plaintiff, testified that he lived at Niles; is an employé of defendant, now yard master, and has been two years the 15th of August; knows the plaintiff and remember- of his getting hurt in May, 1882; saw the place where it was claimed he was hurt on Fifth street, east of the crossing, on north side of the south track, north rail, east end of the plank.

Q. Will you describe the place you saw there?
A. How do you mean—by this block?
Q. Any way you please.
A. The hole had been cut out by a car wheel. I don't think it was that wide. The car had run upon the plank and broke
92 a piece out of it; don't seem to me it was that wide; it might have been, though.

Witness further testified he should judge it was a foot or eighteen inches long and about four inches wide at east end; might have been wider; tapered off as it went west similar to that (referring to exhibit); didn't put his foot in it; hole had been there some time; can't tell exactly how long. Mr. Doliver had charge of the roadbed. He had a foreman under him, Henry Perine, who had charge

of the crossing switches and track and a force of men under him for such work; don't know how many men or whether it was their duty to repair such places as this.

The witness John Lino, cross-examined by counsel for defendant, testified that he was in the employ of defendant May 16th, 1882, as head switchman; had to go over this place a great many times a day; couldn't say whether plaintiff knew of this hole; never talked with him about it; never at any time reported this hole to Mr. Doliver or Mr. Perine; never made report of it at all. All that was necessary was for him to keep out of it; was all he cared; didn't think anybody else could get into it. It was near a switch and a man would naturally look out for and keep out of both places; thought the switch was worse than the hole. He used himself to go in there to pull pins or couple cars; always looked out for himself or his feet among those switch cars; didn't put his foot into it; didn't want to try it; never measured it to see how wide or long it was; should judge it was 18 inches long.

JOHN YOUNG, sworn and examined as a witness for plaintiff, testified that he was in the employ of the defendant and had been in such employ 19 years; a portion of that time at Niles; remembers when plaintiff got hurt, and was at the track that day about ten minutes after he got hurt. He was at the Saxe house when
93 witness went up; went up and saw the place where he got hurt at Fifth-street crossing, south track; saw the piece of plank broke out on the crossing of the north rail; should think the hole a foot long; perhaps longer; didn't take particular notice; should judge it four inches wide at the east end; had seen the hole before; been there for some time; put his foot into it and tried it and it was fast; could not pull it out; noticed blood near to it and west; noticed no splinters close by.

The witness, John Young, cross-examined by counsel for defendant, testified that he lived in Niles, and at the present time is watchman at the round-house; in May, 1882, was the same—watchman at night; commenced work at 6 o'clock in the evening and was off at five o'clock in the morning. This round-house is at the west end of the yard; located inside of the round-house at night; did other work; fired up engines and cleaned them during the night; fired them up in the morning and got them ready to go to work; saw this break in plank at east end of the crossing; didn't tell anybody in particular until Mr. Gregg asked him after the accident. Mr. Gregg came to the crossing; witness's attention first called to this break one night before the accident. He went after some oil that they burn in their lamps; had to go out at the car shop right at the switch where the accident happened and crossed at that crossing at the time a train was pulling in and had to hurry up to get across; so, passing quick, he got into that very place with his heel, but got out easy enough; looked back, but didn't have time to examine it till he got the oil and came back, and then looked at the place; was going across the track east; don't remember how long this was be-

fore plaintiff got hurt; might have been a week or two weeks; cannot tell; somewhere about that; didn't report it to anybody; was not his business; don't know as he saw it afterwards before plaintiff was hurt; might have seen it a day or two before they put another plank there.

94 Q. I mean after you was caught and before plaintiff was injured.

A. I saw it before; yes, sir.

Q. Any more than this once?

A. Yes, sir; saw it several times when I passed by there.

Witness further testified that this first time was about 8 o'clock—shortly after he went to work; can't tell just the minute; maybe not within half an hour, but about that time.

Witness further testified that he should think that a person attending that switch all the time would be likely to see that break; could easily have seen it; first told Mr. Gregg after the accident that he had seen that hole and nobody else; never talked with Mr. Gardner or Mr. Coolidge about it.

JOHN ETZCORN, sworn and examined by counsel for plaintiff, testified that he was in employ of defendant, and had been a little over eight years; recollect when plaintiff was hurt. Witness was switching up there; had charge of the road nights; could not tell what plaintiff was doing that morning; didn't see him. Just before he got hurt he was standing a little way from that track that he claimed he got hurt on—the last he saw of him; couldn't tell whether he helped make up any trains or couple or uncouple any cars; didn't see him.

Q. Did you give him any directions about it?

A. I cut off a car and got on top *off* it to ride it down on the south side, and he spoke to me. I think he said——

Objected to by counsel for defendant as hearsay, irrelevant, and immaterial. Objection overruled, and counsel for defendant excepted.

Witness further testified that plaintiff spoke to him and asked him, "What next?" that he, witness, told him, "One in and

95 one out," and came down and put that one he, witness, was riding down; then, as near as he can remember, as he rode that car down to the freight-house track, heard him halloo. Witness jumped down and run up there and saw him lying on the crossing, hurt.

Q. Had he been assisting or aiding you for some time back?

A. Well, occasionally.

Objected to by counsel for defendant as irrelevant and immaterial. Objection overruled, and defendant's counsel excepted.

Witness further testified *that* what he did in aiding witness: Would sometimes cut cars off, sometimes couple them, sometimes switch, other times would ride cars down; had been doing that business before the accident, some time; don't remember how long. Mr. Bachelor — not about the yard mornings that he remembers

of; didn't pay attention; sometimes would see him before he went home, sometimes not. He went home at 7 o'clock, same time plaintiff did; had charge of the yard nights under Bachelor; Bachelor was yard master; plaintiff's work in the yard was part of the yard duties.

Q. Was he (plaintiff) acting under you at that time?

A. Well, yes; I should think he was.

Witness further testified that he just noticed the place where he claimed he got hurt; saw a hole in the plank there; hadn't seen it before.

Said witness, John Etzcorn, cross-examined by counsel for defendant, testified: Was night yard master 16th of May, 1882; had been up to that night. I had charge of the yard nights; don't remember of a freight train coming in from the west that morning and stopping there; it was time for such a train, but don't remember its coming in; remember of those five cars attached to
96 an engine spoken of; don't remember the time in the morning they were making these shifts—somewhere about 5 o'clock; thinks he made a statement in this case about May 24th, 1882.

(Statement here shown to witness and he says that is his statement. Statement marked "Exhibit B," a copy of which is annexed.)

Witness observes on the statement the time in the morning; is not sure that was the time—5.30—but thinks it was; couldn't tell how many cars were attached to the engine at this time; might have seen Mr. Gardner every little while all that night; with reference to the movements of the engine and five cars talked about, became aware of the presence of Mr. Gardner that morning after he had cut off this one car; sent that car down the south track; this runs north of the freight-house. He spoke to witness, and so became aware of his presence; asked witness, "What next?" The first words spoken between them were by plaintiff to witness; had not asked of plaintiff that morning any assistance whatever, as he remembers of; thinks he would have uncoupled these cars himself if plaintiff had not; it was a part of witness'es duty; had not required the services of plaintiff in any capacity, and had not asked him to help him that morning; thinks plaintiff was under his direction at that time. Witness had charge of the yard, and if he told him to do anything supposed he was to do it; thinks he was a superior in employment of the company to plaintiff. His business was to see that the work was done and that trains—way freights—got in and out regular. Witness himself was to do this work—switch and couple cars up to this time; don't remember of seeing Bachelor in the yard that morning; don't know as he saw Bachelor at all that morning; don't remember what car he cut off; thinks it was a D. L. W. blue; wouldn't be positive; don't remember what car was next to it; was
97 placing those cars there that morning himself, and was not aware of Gardner's presence there at all until he spoke to witness; when he went down to Gardner after he heard him

halloo, could not tell where he was lying with reference to the west end of the plank on the crossing.

Q. How near to that?

A. Somewhere about the center; might have been a little west of the centre. I could not tell just exactly where he was lying; don't remember whether he had any talk there with plaintiff; don't remember how light it was or whether the sun was up; never noticed this defect in the plank till after the accident; didn't see Gardner go between the cars. Gardner when he first saw him was standing about a rod from the south track; as near as witness can remember, about northeast from him—a little west of Fifth street, he thinks; not over five minutes elapsed before he heard Gardner halloo. Witness's car had gone six or eight rods, he thinks; don't remember whether his car was moving or had stopped when Gardner called his attention; was at the top off his car, at the brake. When the car stopped he got down; couldn't tell whether his car was moving or not when Gardner hallooed to him. It had been detached from the other cars; don't know whether he remained on top of this car after it stopped or got right down; took no measurement of that break in the plank.

The witness, JOHN LINO, recalled by counsel for defendant and further cross-examined and testified that the Michigan Central railroad in May, 1882, was running on Chicago time; slower than this time. Niles time was eight minutes faster—between seven and eight; don't think there was any break in that plank when put there; was made as such crossings usually are made; couldn't say whether I saw the plank put in and couldn't positively tell its condition when put in. They have to keep men putting in plank there and keep repairing up; thinks he saw this plank before it
98 was broken, and that end was square and perfect; couldn't tell how long before. These plank last for a long time; square on the end because nobody drives over them so near the end of the plank; didn't examine the plank to see whether it was defective; just merely saw it; couldn't tell how long before the accident it was; should think it was a month before the accident; couldn't say for that. The next thing he noticed was that there was a hole there. Witness made the hole—helped to make it; thinks before he made the hole the plank was sound at that end.

Q. Did you report it then?

A. No, sir.

By counsel for plaintiff:

Q. Did you conceal it?

A. I would get 15 days if I said anything about that.

Q. Did nobody know it about there?

A. That I don't know. I never talked with any one about it.

Q. Did anybody else but you know it?

A. I think they did.

Counsel for defendant moved to strike last answer out. Motion overruled, and defendant's counsel excepted.

Q. State whether Mr. Bachelor knew it.

A. I think he did.

Q. How long before the accident was this break made?

A. Well, I should think a month anyhow. It might have been longer; it might not have been so long.

By counsel for defendant:

Q. What did you mean when you said if you had reported it you would have got 15 days?

A. We got notice that such things would not be overlooked.

Q. What was the penalty?

A. I don't know; according to how well you were liked.

99 Q. You were laid off 15 days?

A. I would have been or probably discharged—either one, just according to how well you are liked.

Q. Then you did not report this for fear you would be discharged or laid off 15 days?

A. That is it; yes, sir.

Witness further testified that he never had any talk with Bachelor about that, and that all he said about his having known of this hole is what he thinks and guess-work; and counsel for defendant moved to strike out all that testimony of the witness as hearsay and irrelevant and immaterial.

The court strikes it out.

Witness further testified that he knew at this time that all running off from switches and accidents of that nature were requested by the company to be reported to the yard master, but witness didn't report it for the reason he has stated; that the facts he knows of with reference to Mr. Bachelor's opportunities to know of this break in this plank are that he had to cross that way to go to his office; that he had charge of the car shop and yard at this time and his office was in the car shop—the building opposite that switch; he would go across there from a dozen to fifteen times a day. He might not have gone across where that hole was in particular, but went across that way; saw him frequently go across; had to go within 20 feet of it to get to the shop; knows that Gardner was hired as switchman to tend the east end; what else don't know. There is a switch right at this break. Gardner attended that switch and his opportunities for knowing that break in the plank witness thinks as good as Bachelor's. His opportunities were good for knowing and seeing that hole; only about 15 feet from the end of the switch-rail to that hole.

100 Mrs. GARDNER, sworn and examined by counsel for plaintiff, testified that she was the wife of plaintiff; recollect the time when plaintiff was brought home that day—about 6 o'clock in the morning. His leg was amputated about 9 o'clock. He was confined to the house, should judge, about six weeks. He did no work till the first of August, 1882, and not able to do a great deal then—only a little while at a time. Mr. Gardner at the time of the acci-

dent was a healthy man, capable of working all the time; had been at work for defendant about 12 years.

The plaintiff here rested his case.

The counsel for defendant then called as a witness W. B. STILLSON, who was sworn and examined for defendant and testified that he resides in Detroit and is a civil engineer, in defendant's employ in the engineer corps; was requested to make a map showing location of the tracks at the Niles yard about a week ago and made such a diagram.

Diagram here shown the witness, and witness, referring to it, says the diagram shown to him is the one he made and is on the scale of 20 feet to the inch.

Witness further testified that he made this map from measurements which he took, which he made himself with the help of an assistant; that it correctly shows the tracks and their location at the station of Niles, at Fifth-street crossing, as it was before the accident; that, so far as the plank are concerned, he had to take Mr. Doliver's word; in other respects it — his own measurements.

Counsel for defendant then offered in evidence the map of the station, ground, and track shown to the witness, which is received in evidence and marked "Exhibit C."

The witness then, upon request of defendant's counsel, pointed out to the jury upon the map which was east and which was west and Fifth-street crossing, and, with reference to said Fifth-street crossing, where was the freight and which was the freight-house track
101 and which was the switch. Witness further testified that from the east end of the freight-house switch to the west end of these plank, on Fifth street, distance was about 74 feet. The distance before striking the east end of the plank on Fifth street would be 74 feet plus 32 feet. The distance from the first switch to the end of the moving rail is 15 feet. This switch-bar has a clamp arrangement which slides on the rail.

Q. With this plank coming up to the north side of the rail, what would be necessary to be done?

A. That projects a little, a couple of inches probably.

Q. Now, taking the main track, how far is it from the west line of this planking to the station?

A. About 300 feet.

Said witness, W. B. Stillson, cross-examined by counsel for plaintiff, testified that he dan't know personally how the track and planking were in May, 1882; that the distances he gets are from measurements now; they might have been changed within the last year or two.

Mr. DE ROSIER, called and sworn as witness for defendant, testified that he lived in Detroit and was a special agent of the Michigan Central Railroad Company, and had been such agent since 1879; was such agent in May, 1882; is acquainted with plaintiff; first became acquainted with him in '80 or '81; remembers of the acci-

dent happening to him at Niles; saw plaintiff on the 19th of May, 1882, at his house in the morning; talked with him about the accident; asked him how the accident happened, and he said it was done so quick that he could not tell exactly, but he thought that he caught his foot somewhere on the crossing and that the wheel passed over him. Witness asked him to show him his boot—the boot that he wore at the time of the accident. Mr. Gardner then sent his wife after the boot, and she brought witness the boot, and it looked perfectly good; there was no scratch, no show where it caught
102 on the boot, and witness said it could not be that the wheel had run over him, because the boot looked perfectly good, and very likely the brake-beam had caught his foot and in falling it had run over his leg and crushed it, and plaintiff came to about the same conclusion with witness. He said he couldn't tell exactly, it was done so quick; how he caught his foot he didn't know, but thought he stumbled at the end of the planking. Witness asked him how he happened to be there uncoupling cars, and he said sometimes he helped the boys; that he was standing by and uncoupled that car; said he was injured in no other way than this leg; made no complaint about his other leg or foot.

Said witness, De Rosier, cross-examined by counsel for plaintiff, and testified that a lady he supposed was Mrs. Gardner, and whom plaintiff introduced to him as his wife, was present. Witness was sent by defendant to see plaintiff. He would say it was at that time his duty to see to all personal accidents without any one saying anything to him to go here or go there; made it a point as soon as he could to see people. As special agent his duty was to investigate accidents; has police force over the road that he looks after; used to be, but is not now, a detective; quit detective work about six years ago; has a force under him now; nobody particularly requested him to go there; as he said before, when an accident happened as soon as he could he would go there. Had an inquest to attend to at the time Gardner was hurt, and couldn't go till the morning of the 19th. Gardner was not quite feeble when he saw him; talked readily and freely; was there between 8 and 9 o'clock; said he thought he had tripped at the end of the planking, were the words he used; did say he thought he caught his foot in a hole; said there was a hole, but witness understood it to be in the ground.

Q. Then you didn't get a discription of the accident from him at all?

103 A. Yes, sir.

Q. You say you didn't understand from him that there was any hole at all?

A. I understood from him that there was a hole at that end of the plank. From what he told me I thought it was in the ground somewhere.

Q. You thought it was a cavity in the ground?

A. A little hole in the ground.

Q. He didn't speak of any hole in the plank?

A. He said there was a hole at the end of the plank and he thought he had tripped his foot, but it was done so quick that he could not tell how it was.

Witness further testified that plaintiff said that he was uncoupling a car; did not say that he was doing it by orders from the company. Witness asked him about that, and he said that sometimes he helped the boys, and he was standing by and he uncoupled that car. He didn't say that they had told him to help the boys; didn't believe he asked him about that; asked him about his duties, and he said he was switch-tender; looked at the boot of Gardner right by his bed; was within two feet of him; looked at the boot while they were right by there; didn't see Gardner again; came several times to see him, but he was always away.

H. G. PERINE, sworn and examined as a witness for defendant by counsel for defendant, testified that he lived in Detroit; in May, 1882, resided in Niles; was at Niles foreman of track repairs at Niles yard; had been in that capacity about a year or eight months; was acquainted with Fifth-street crossing; could not say whether the plank in that crossing were put down in the fall before or early in the spring of 1882. The plank at and around the south track were good; they used pine plank; when put down 3½ inches thick, 12 inches wide, and 16 feet long; regular crossing plank, such as usually used for such purposes by railroads. The plank that
104 were put down there were good, sound plank; witness had the pick of a lot of it; he picked the best to put in his crossing.

Q. When it was originally put down what do you say as to its being a good, perfect crossing for the purpose and place?

Objected to by counsel for plaintiff for the reason that it is an opinion. Objection sustained, and counsel for defendant excepted.

Witness further testified that he knows it was in fact a proper and suitable crossing; knows of no complaint ever having been made of that crossing. The width between the rails is 4 feet 8½ inches—width of a box car, he thinks; about 8 feet from outside to outside. It would project over the rail on each side a foot and a half or two feet; they vary in width. Has worked for defendant about 20 years, track-repairing; is well acquainted with railroading; been his constant business; has been foreman 14 years; has heard the testimony of Mr. Gardner, the plaintiff in this case, in reference to how he was caught; saw him refer to this block here; also heard the testimony of Mr. Cook and Mr. Shockley; saw them place their feet in that. That plank was not removed after the 16th of May and a new plank put down while he was in the yard, and he left the yard the 8th day of November; had occasion to investigate the plank after the acciden-; the plank was sound, as near as he could see.

Q. Now, sir, will you state whether or not, in your opinion, it is possible for Mr. Gardner to have been injured in the manner he says he was with his right foot caught as he says it was at this point?

The question not permitted by the court. The court said: "If he had seen persons caught in a similar position and seen the effects of it he might be an expert; if he had not it seems to me he would not be an expert in the matter."

105 To which ruling and opinion defendant's counsel excepted.

Witness stated that he had seen accidents of a similar nature on the road in frogs or otherwise; five or six within that period of twenty years.

Q. Now, will you get in there and illustrate how you understand Mr. Gardner testified as to the way his foot got caught?

A. This was the way I understood it, and he undertook to get out by putting his foot here.

Witness further testified that with his experience as a railroad man and his observation of accidents of a similar nature, in frogs, with a car pushing plaintiff on the shoulder and the brake being there, the tendencies would be to draw the boot faster instead of looser.

Q. With the foot in there in that way and the force of a locomotive back of it, what would be the effect on your leg and ankle?

A. It would either tear the foot out of the boot or break the boot, it seems to me.

Q. He would be held in that position and the train would pass over him, would it not?

A. If his foot was in there in such a position as that is.

Q. The tending would be to draw forward and tear instead of loosen?

A. Yes, sir.

Q. Suppose that underneath there is no space, the plank lay on the solid ground.

A. That plank that is next to the rail I spiked to a tie; I had the plank beveled on the bottom for the rail to work an inch and a half or two inches.

106 Q. Just illustrate to the jury what you mean; there is a grip here, I suppose?

A. Yes, sir; this grip works on here; it is about four inches wide; I cut out of the plank like this, I beveled the edge like this, so the flange would go out under here.

Q. So it would come up close to the edge of the rail?

A. Yes, sir.

Q. How far from the end was this notch cut in the plank?

A. Seven inches, I think, as near as I can remember.

Witness further testified that when he discovered this *brake* after the accident it was broken a very little beyond the point, as near as he can remember, where this notch was cut, no more than two or three inches; the piece was broken down from the end to this point; might have been a little piece broken off; that is the only proper way to join the wood and the rail in *fuch* places; on stationary rails they never champer them off at all, but a switch-rail has got to have more room to work back and forth; between these ties

or stringers it is bedded on the ground; the ground is beveled off level with the top of the ties, then the plank spiked to the ties; in reference to the parties seen caught in a frog after the train had passed they were found in reference to the point of fastening, and the foot smashed up, still at that point, wedged in; saw one about two months ago caught the same way; saw one at Niles just before Mr. Gardner was hurt; saw two or three in the Michigan City yard; the tendency is to draw the foot in tighter, and something has got to give way before they can get it out.

The map of the tracks and their location here shown to witness, and he testified that it correctly represents the tracks as they were on the 16th day of May, 1882; no tracks added and none taken out since then.

107 Q. What have you to say whether the plank are correctly represented as they were on the 16th of May, 1882?

A. No, sir.

Q. What is the difference?

A. This plank here at the switch in the centre of the track north of the north rail is just the same, but the plank in the inside of the track set back a little further west, I think. The plank on the outside of the rail is just the same; the north side is the same. I mean the extreme east line of the plank running north and south are not exactly the same. The line of the plank in the center of the track does not line with the plank north of the rail. They don't go east as far as they did at that time.

Said witness, H. G. Perine, cross-examined by counsel for plaintiff, testified that he could not say when these planks were changed; had not been in that yard for very nearly two years; left in November after the accident; have seen a number of accidents on that road from frogs; not from any plank like this; from frogs where a man got his foot caught; have seen no accident that happened in a plank.

Q. Now, isn't it possible if a man caught his foot in there and he should be struck by a car on the shoulder and throwed his body forward that his foot might come out?

A. Anything is possible.

Q. Then it is not impossible?

A. No; I suppose not.

Witness testified that he left Niles Nov. 8, 1882; his attention was never called to the hole; the first he noticed it was when Gardner got hurt; saw it that morning; he was hurt about half past six o'clock.

Q. Did you give directions to have the plank cut off?

108 Objected to by counsel for defendant as immaterial and irrelevant. Objection overruled, and defendant's counsel excepted.

A. Mr. Doliver told me to have it cut off; got his orders from him; it was cut off in this shape; not beveled, but chopped square off with an axe; they may be now; where cut off it didn't show

any decay; it was sound so far as he saw; saw the end of the plank that was cut off; the chips cut off didn't see; were gathered up to keep the track clear; Mr. Ream cut it off, if I remember right; witness examined it after it was cut off to see if it was properly done; the plank, as he saw it then, was all right.

It is conceded by respective counsel that on the morning of the 16th of May, 1882, the sun rose at 4.38 o'clock.

It is here offered in evidence by counsel for defendant, the time, 5.30, stated in plaintiff's report, to which plaintiff's attention had been called.

E. D. BACHELOR, a witness called, sworn, and examined by counsel for defendant, testified that he resides in Dakota; has lived there since a year ago last August; resided before that in Niles, Michigan, and was there yard master for the Michigan Central Railroad Company a little over four years; is acquainted with the plaintiff; have known him as long as I was there at Niles; he worked for the company in the yard, subject to witness's orders; can't tell how long he worked in the yard; commenced, he should think, some time in the summer, I should say, of 1881, previous to this accident; his hours of duty — from six in the evening to seven in the morning; remembers the occurrence of his, Gardner's, being squeezed in between the cars; thinks he had several conversations with Gardner about it; witness gave him instructions in regard to what he should do; that he should not pull any pins or do any coupling in any way; witness never countermanded these orders; never, after giving Gardner these instructions, did he ever tell him to go forward and
109 to do that kind of work; Gardner was under his, witness's, immediate employ in the same yard, doing the general night-work in the yard; witness had full control night and day and Gardner was subject to his orders to do such work as he required in the yard; remembers the occasion of his injury on the 16th of May, 1882; was not there when it occurred; got to the station that morning about six o'clock. Gardner at that time was at the Saxe house. They sent for witness to come down; went and looked at the crossing; found marks of where he was dragged; that was about all he could see on the plank on the south track.

Witness is shown the map and says it correctly represents the tracks there as it was on this crossing; he would say the appearance of the dragging commenced about eight or ten feet from the east end of the plank; below where the dragging commenced he saw blood and the appearance of dragging; was from eight to ten feet from the east end of the plank; at that time discovered no defect in the plank; no defect at the end of the plank on the north side of the rail; didn't afterward notice it particularly; didn't remember noticing any or having his attention called to it at all; don't remember as his attention was called to it that morning.

Q. Did you ever see anything on the north side or was your attention ever called to anything on the north side of the north rail of that south track, at 5th-street crossing, that looked like that?

A. I don't think—I don't think I remember any such a place; I should certainly have thought of it or saw it if it had been there, because I was over it a good many times a day and around there.

Witness testified that after he had inspected the crossing that morning a car was shown to him that was said to be the car
110 that run against Gardner. It was a Michigan Central, number 520, an old car, but apparently in good running order; thinks nothing defective about it; of the class of cars then run by the Mich. Central R. R. Co., the brake-beam and shoes on the car being low.

Witness has no recollection at all of having conversation with Mr. Gardner on the evening of the 7th of May, 1882, at the east end of the tank, in which he ordered Gardner to assist Etzcorn the next morning to couple cars; don't think he had any such conversation with him.

The witness Bachelor, cross-examined by counsel for plaintiff, testified that he had charge day and night, but was not around nights usually; left in the evening generally at 6 o'clock. John Etzcorn had charge of the yard at night, from six in the evening till seven in the morning; during that time he done the work under his name; had control same as if witness had been personally present; thinks he didn't have any office at the time of and a short time prior to the accident; they were going to, but hadn't at that time built one for him; was in the habit of crossing Fifth-street crossing often; was there a good many times a day; didn't notice anything of the kind there; didn't learn it was there until the day of the accident; don't remember of seeing anything of that kind there.

Q. Then you didn't see any defect?

A. Not in regard to that; no, sir.

Q. No hole of any kind?

A. No, sir.

Q. On the day of the accident?

A. No, sir; I didn't.

Witness further testified that he left the employ of the Michigan Central Railroad Company the 20th of August, 1882.

Q. After that length of time, wouldn't your memory be a little weak as to a conversation?

111 A. It might.

Q. You don't pretend, then, but that you may have stated that to Mr. Gardner?

A. I think I should not have told him to do that work and forbid him before to do it; it was not my way of doing; had no positive recollection about the matter; don't remember whether Gardner did help Etzcorn before this accident in making up trains; might have done so; don't know that he did; don't think he did; recollection is clear that he forbid him doing it; forbid him when he hired him; also after he got hurt the first time in November before; Gardner had not at the time of the first injury been assisting Mr. Etzcorn.

Q. How did you come to forbid him then?

A. Having charge of the yard and knowing that he got hurt, it was my place to look after him and see that he didn't get into a place where I told him not to get.

Q. You may state how he got hurt the first time.

A. I didn't see him get hurt.

Witness says he was in employ of defendant in the yard; it was in the night and he was not there. Gardner was not helping Mr. Etzcorn; he was at the time he got hurt switching at the east end of the yard, east of Fifth street. Witness lives in Dakota; came here for defendant on a pass and went to where that place was that morning—Fifth-street crossing; noticed the plank on crossing; don't remember seeing any hole; recollect of seeing some appearance of dragging; saw the marks where he was dragged; don't remember hearing anybody speak of a hole; got there about 6 o'clock in the morning; the night yardmen were there; Etzcorn was in the yard back and forth; witness was there in the yard all day; heard the accident talked of; went and looked over the ground where he was hurt; looked over all that planking and didn't see any such hole in the plank as that there (witness referring to the hole in the ex-
112 hibit); can remember where he was dragged; witness means to say that he can swear positively that there was no appearance of dragging further east than he spoke of—six or eight feet from the east end of the plank; went back to the east end of the plank to see; looked it all over to see, as a man would if there had been a hole like that he would have been apt to have seen it; saw no appearance of dragging at the east end of the plank; nobody spoke to him about any hole there; don't remember that he heard about any hole there after.

Q. You can see that hole there, can you (referring to exhibit)?

A. Yes, sir.

Q. Do you think you could have seen it that morning if there had been such a hole there?

A. I might have seen it.

Redirect examination of witness Bacholor by counsel for defendant, — testified that he looked at the brake-beam of the M. C. car 520 on the west end.

Q. Did you discover any marks or anything peculiar about the beam or the bolts or anything there?

A. I saw some of the threads out of his overalls at the bottom there and I think a little blood on the brake-shoe; some pieces of flesh, I should say, and some threads out of the overalls.

Q. Where were they?

A. They were right on the brake-shoe—brake-hanger.

Q. Bolts?

A. On the bolt heads that run through the east-iron shoe.

By the COURT:

Q. The brake-shoe is that part which fits up against the wheel?

A. Yes, sir; iron part that fits upon to the wheel.

113 Witness further testified that when he was not there Etz-

corn had charge of the yard; Etzcorn had no power to hire or discharge any man in the yard.

Q. Had Etzcorn power or right to order Mr. Gardner to do anything contrary to your orders?

A. It is kind of a queer question for me to answer; as to his having charge in my place, he might order this man to do it—no, knowing what my orders was; but I don't think he would order him to do this work if he knew I had forbid him doing it.

GEORGE W. DOLIVER, sworn and examined by counsel for defendant, testified that he lives in Niles and is division road master for the M. C. R. R. Co.; that A. G. Dailey, of Detroit, is superintendent of tracks and bridges of same company, and has entire control of all the tracks and bridges and right of way on the main line of the Michigan Central railroad and all its branches.

Witness is what *is what* is called a division trackman or road master, his title; his duty, to keep road-bed and all things on his division in as good possible repair as can be done.

Q. From whom do you get the material for the construction and repair of your road-bed, or anything connected with it?

Objected to by counsel for plaintiff as immaterial. Objection sustained, and defendant's counsel excepted.

Witness further testified that accidents on the road and defects occurring along the line of the road, in his department, were referred to A. G. Daily and the division superintendent of each division; in case material is needed witness would order from A. G. Dailey for repairs generally; the material is kept on hand; witness constructs the repairing; it is required of the trackmen; it is their business to repairs defects of the track if they have anything to repair with; if not, to order from him; they are required
114 to make a report to witness, and he reports to A. G. Dailey; knows where the M. C. R. R. crosses 5th street; has no recollection of the day the planking was put on the crossing last befor- May 16th, 1882, but should judge it was early in the spring of the year—about April; it was a proper crossing for the place at the time it was laid; they put in new plank and it was in good condition; on the morning Mr. Gardner was hurt first learned of any defect in that crossing, between 6.28 and 6.30, coming to the office; they told him that Gardner had got hurt on the 5th-street crossing, and he went up there about 6.30, he thinks it was; several persons around there; don't remember who; looked the entire crossing and south track over where he stated to him he got his foot caught and was thrown down.

Q. Just state what you discovered; never mind what was told you.

A. There was a small piece in the corner of the plank—nothing similar to that, though (referring to the exhibit)—where a car had run off the switch and broken the end of the plank, crushed it down on the end about seven inches long and about three inches wide; I tried to put my foot in it in several shapes, but there was

only one way I could get it in; if I did I could not get it out unless I pulled it back east.

Q. Illustrate to the jury how you did with this trap.

A. There are 2-inch plank here; the plank are three inches thick, rather, by 13 inches wide and 16 feet long; this is the north rail of the switch; there would be another rail over here; here is the cross-bar that goes across, and another here to the head block, the same as you have got on that sketch; we call that west and that east; the hole was here; there is a rule I have carried for seven years; I took this rule out of my pocket, placed it in that way; this hole at this end was about three inches wide; placed it down here and it was about seven inches long, where the
115 car wheel had run on there. The plank where it was crushed down was still in there, but pressed down. That piece of wood would indicate one tie. You would have another one here. The cross-bar to the switch fits in there. These two ties were four inches apart. They might have been five. This cross-bar fits in there; it comes over this rail. This switch has to work backwards and forwards, and in order to let it work where the plank were put down a man took a hand-ax and champered it on the bottom edge for this cross-bar to play in. They are left full here, so there is no hole on the top. This plank was laid full. These plank are 3 inches—3½ inches. They always take out the thickness of the plank to put next to the rail, so as to leave it as level as can be. That was champered out in there. If you had another plank to lay here to represent the other tie——

Q. Take a book.

A. That would be another tie. The ties would stick out here two feet. This is a continuous planking; comes to there. This street is on an angle; comes down there. These plank are 16 feet long or two ties in length. That would make the plank 32 feet long. There is the switch. This plank came up by this cross-bar. That was champered out on the bottom. Now, you will notice, if any of you have seen railroads, that switches work both ways. This switch pulled all one way—all south. I have been over that crossing a great many times. Both the side tracks—and here is the main track, which I looked after more than I did the side track, because we have yardmen, and it is their business to look around and see where there is a defect and repair it. If they have not got the material they come to me. This corner at that time was broken out. As I said, take this hole three inches wide; it might have been a little more. You take and cut out on the bottom side of this plank where the car wheel came down. This switch-rail had to move round here like that. That had to throw around; conse-
116 quently it would throw it away from this plank here. The rail next to the plank is a movable rail. These rails are 26 and 27 feet long. Of course, if you move it over here, it would have to move down here without starting that end. The track is spiked to the ties. The joint would be here, down about 12 feet from here, 15 feet from here up to the switch, and 12 feet from here down there—27 feet rail. Some man had left this switch so the car

run off and run into the edge of this plank. Where this cross-bar goes on there is a hole in there. The car wheel had pressed this piece off the plank where it struck here—pressed right down into that hole—and the plank stood something in that shape—the piece that was broken out.

Q. So that the west end of the piece of plank broken out was almost even with the top?

A. It was down about like that. You take a piece of pine like that and run anything onto it—crushed it down in that way. How long it had been that way I don't know. I tried to put my foot in there. I could not get it in, unless I put it in that way. A man with a small foot might step his toe in there, but if he got his toe in there it would hold him. He had no chance to get out if a car struck him here. He would have no possible chance, because that hole is a very little over three inches; get his foot in there and the car striking him here would take him right down, and it would pull this leg and all off, and the car would run right up his back. That is my opinion. I was there about 6.30, but how he got hurt I never could find out.

Q. What would you say as to its being possible to get your foot in that way and get it out with a train of cars backing up against you?

A. I don't think a man could do it, unless he threw himself right outside here, and then the box on the car would brush him—brush this leg.

Witness further testified that if Gardner threw himself over
117 to the north he would be likely to break his ankle. The journal is seven inches long; that if a man got caught in there and the car pushed him along it would break that foot off or cut him in two and leave him in there. If he had his foot in there, the box would stick out here and the journals would leave him no possible show. A man couldn't get his body in there with the car standing out here. The body of the car is 18 to 24 inches outside the rail. The car body would take him; could not get that foot out without injuring this one. He might possibly throw himself over sidewise, but he would have to break this leg.

Q. Now, what do you say as to that (referring to the exhibit) being a correct representation of the hole in the plank at the time you saw it?

A. I don't see that it is any representation at all. That is a hole cut out by some man.

Witness made this investigation about 6.30 in the morning. Next he went to his office. The yard foreman came around; went to the car that was claimed to have hit Mr. Gardner about 8 o'clock; discovered threads from overalls and flesh hanging on the bolts just inside of the brake-shoe on the brake-beam.

Q. Will you take that piece of paper and make a diagram of that car and the brake-beam and the brake-shoe? Will you illustrate by this diagram you have made to the jury the position of the wheels, axle, brake-beam, and shoe?

A. There are the bolts of the brake-beam. There is the shoe.

That, of course, is the front of the wheels. That represents the box there, that the journal goes into; that is the box. The brake-beam hangs here. That is the shoe. This flesh was hanging on these bolts, and overalls. This brake-hanger would be inside the rail from three to four inches. They hang on each car. This one, I think, was about three inches.

118 Witness says there were two bolts, about two inches apart. It was upon these ends that he found overalls and flesh. It would fetch it over this rail and in or about the first tier of plank; first learned of this defect in the plank about 6.30 that morning; discovered that something had been dragged on the crossing, and they said it was where Gardner was dragged. That commenced between eight and twelve feet from the east end of the plank; from that point about twelve feet to where the appearance of dragging ceased; not positive as to that; think it was four paces; paced it off. From the east end of plank to where the dragging commenced was four paces; went to the end of the crossing; went three steps off and the next step or a little beyond. There was a little blood on the plank. That would be four paces; looked to see if he could see where Gardner slipped, and discovered that was where the first marks were in the sand on top of the planks, showing that something had been dragged there. This was nearer to the north rail. The marks showed on one plank north of the north rail and a plank and a half in width between the rails, and there was some right over the rail; should judge he was dragged about 12 feet.

The witness George W. Doliver, cross-examined by counsel for plaintiff, testified that he don't remember who was near him while he was there; quite a number there; don't think he saw Mr. Bachelor at that time; probably saw him that morning about half past seven or eight o'clock; saw him near the telegraph office; thinks he asked him where the car was that pushed Mr. Gardner down; didn't state to him what witness had seen. The hour he went there was about 6.30 in the morning. The appearance of the plank was dirty; a little dirt on it, what would naturally accumulate from teams going across; crossing cleared off most every day; no dirt in this hole that he remembered of. The appearance of the dragging was that something had been dragged across this rail on this plank; also on one inside; brushed right along. There was a little dirt

119 on the plank of that crossing; marks of dragging were plain, and there was dirt on the crossing which had accumulated during the night, probably the day before. The crossing is cleared every day or two; thinks it was dry weather; didn't rain that morning; should judge the width of the appearance of the dragging about 18 inches on the outside in one or two spots; wider where it started in; as it went west showed more of it; became larger, so it looked as though a man or something five or six feet long had been rolled around. The pool of blood was about the centre of the crossing; right outside the rail; should judge a foot from the north rail; might have been a little more. The flesh he saw was on the brake-beam; didn't notice any on the planks. The pool of blood

from the east end would be about 25 feet as he paced it off; were two places of blood; there was a little inside the track and some outside; paced it that morning; nobody with him; some were standing around there; none of them his men; looked it over and passed on down to his office; tried the hole that morning from the east end; put his foot toward the west.

Q. Isn't it possible that this accident may have happened to Mr. Gardner just as he was extracting himself?

A. I don't see how it could.

Q. Suppose he had been struck by a car on the shoulder, do you mean to say that he couldn't get his foot out at all?

A. I don't think he could.

Q. You would call that (referring to the exhibit) a pretty bad hole?

A. Yes, sir; it is a bad hole if a man gets into it.

Q. If he gets his foot in there he could not possibly get it out?

A. If he had run his foot in here.

Q. Suppose he hadn't got it in that way?

120 A. I don't see how he could get it in there and then get it out at all. The old plank was in there; it didn't let his foot down under the plank.

Q. Isn't possible that the force of a car striking a man on the shoulder might have pushed the toe out?

A. He going the same way with the car, it would break his ankle.

Q. It is possible that it may have had the effect to push the toe back, might it not?

A. The car was going with the man; he could not get his foot to the bottom of the rail.

Q. Suppose the man himself was resisting, and then the force was applied on his shoulder, isn't it possible that his foot may have been thrown back as his body bent forward?

A. I don't see how it is possible for him to get it out if the hole was in the end of the plank. It was no boot-jack in that shape; it was square across here.

Witness further testified that he measured it that morning; says the board was pressed down into this hole. The car had got off here. There was a cavity under there for this cross-bar which had to be there; don't know what was done with that piece of board which was broken; was the one who had charge of the road-bed at that time in a certain capacity; didn't give any orders about that at that time; did during the day. The piece could not go down any further, because it lay solid on the ties and the ground under that; depth of the hole right there probably two inches and about three inches wide and six to seven inches long; it was not broken clear out; it stood something in this shape; broke the hole right down at the west end and let it remain there.

Q. Was it broken in a square form?

121 A. Take this piece, lay it out there, and something heavy come onto it, it will break it off there; it was in a square form. The plank have been worn out since; it has been replanked

once or twice since; last on these crossings from three to five months, sometimes six; they wear out around the rails. The cross-bar is an iron about two inches wide and five feet long, turned up at both ends, fits onto both switch-rails, which combines it and makes the two rails movable; that cross-bar was located right near that hole; when the piece broke down it broke onto that cross-bar right under the hole. The cross-bar is in the same position, but the crossing has been replanked. The position of the switch is the same as it was then; can't say the position of the ties and track is the same as then. He is not on the spot all the time, and has men who do the repairs; has not noticed any change.

Q. In operating the switch how much difference would it make between the plank and the rail, say in the course of sixteen feet?

A. That switch throws all one way, as I have stated; that would use up more of the throw-rail than a switch that throws, as we call it, a three-throw switch, one track branching to the north and one to the south; that would take up more space than a switch of that kind, which would probably be from an inch to two inches.

The witness Doliver, on the redirect examination by counsel for defendant, testified that one of the south switches was put in their for car repairs; the other they called the coach track; used them both sometimes for repairing cars on; were used every day.

Mr. GREGG, called and sworn and examined by counsel for defendants, testifies that he lives at Niles, and is station agent of M. C. R. R. Co., and has been such agent going on 31 years; was such agent on the 16th of May, 1882; knows plaintiff and knows
122 of his having worked for the company and of his being employed by the company on the 16th day of May, 1882, at Niles Station. Prior to the 16th of May, 1882, had never observed or had my attention called to a hole like that (reference being had to the exhibit) in the plank on 5th-street crossing; saw that crossing on the 16th of May; discovered a little smash in the *in the* end of the plank there; didn't measure it with a rule; tried to get his boot into it; could not get his foot in; could not set it down in the hole; should say it was from six to eight inches long; discovered that morning evidence of something being dragged on that crossing; the appearance of dragging commenced from eight to ten from the east end of the plank and ended fifteen feet from there; was informed that Mr. Gardner was hurt; afterwards looked at the car that run against him that morning; discovered nothing out of the way with the car; there was some threads and flesh on the brake-beam and the shoes that go down on the wheel. (Representation of that purports to be car brake, beam, and brake-shoe shown to witness.) Witness says, That is what I call the brake-beam or the hanger; with reference to the bolts, the threads and flesh were right on the end here—end of these bolts; discovered blood on the crossing that morning; that with reference to where the dragging commenced was three or — feet further west between the rails, south of the north rail.

The defendant here rests.

FREDERICK GARDNER, plaintiff, recalled in rebutting by counsel for plaintiff, testifies that he knows the witness De Rosier; that he was at witness's house after the injury, on the 19th of May; witness was very feeble; De Rosier came to see him.

Q. Now, you may state the conversation.

Objected to by counsel for defendant as hearsay—already been gone into. Objection overruled, and defendant excepted.

123 A. He says to me, "Mr. Gardner, I came to pay you a friendly visit; I didn't come here with any expectation to make any arrangement for the company for anything." Says he, "How did you come there in that place?" I told him I was ordered by Mr. Bachelor to help the boys when I had no work; I told him I had no work that morning of my own. He asked where the boot was; in the first place he asked me how I came to be caught; I told him I got caught in a hole on the east end of the north rail; he says to me, "that's bad." I said, "Yes, it was very bad." Then he wanted to know if he could see the boot; my folks went and got the boot off from the left foot and showed it to him; he placed it on the floor and called my attention to it, and he says, "Mr. Gardner, is that the way your foot was when you was caught; didn't it turn your foot bottom side up?" I said, "Yes; it turned it bottom side up and the wheel run on it." "How was it the wheel run on it?" he says; I says, "My right foot was fast, and as I set my left foot down and as I set my right foot down it pushed me over, and the wheel caught my foot and turned it bottom side up." I told him they shoved me some sixteen feet.

Q. Did you tell him what position you were in when you fell?

A. I told him I cut a car off and was in the act of getting out; that I pull- the pin and laid it on the deadwood and was in the act of getting out, stepping outside the track again; when I went to lift my right foot to step out I could not get it out; I looked to see how my foot was fast and at that I was pushed down.

Q. Just tell how you were pushed down.

A. The car struck me in the back.

Witness further testified that he told him that the car struck him in the back and pushed him down and shoved him 16 feet;
124 that is all witness remembers of telling him; conversation was very short with him; he was very feeble at that time; told him he was dragged on the plank 16 feet from the end, and, furthermore, told him it never broke my bone here until they pulled the car back off from me; told him also that they mashed his foot; then the brake caught him in this shape and tore his clothes and flesh; they shoved me then right along; the condition of the boot he saw was the top was torn off and the sole on one side; his wife and two sisters-in-law were present at the time; they went and got the boot for him; the right boot had a few marks on it as if it had been struck with a stick of wood or something, but he didn't see the right boot; they didn't show that to him; witness heard Mr. Bachelor's testimony.

Q. When was it he told you not to couple and uncouple cars?

Objected to by counsel for defendant for the reason that they went into that *they went into that* on the direct. Objection overruled, and defendant's counsel excepted.

Q. When was it that you were hurt before?

A. February, 1882.

Witness testified that he was at the depot this morning at Fifth-street crossing with Mr. Shockley; made measurements as to the effect of the switch there at the east end; pulled the switch on the east crossing to see; switch stands on the south side of the rail; pulled from the south side track onto the coach track; could hardly discover the movement against the plank; pulled it over on what is called the repair track; couldn't get only about a quarter of an inch between the rail and the plank.

The witness, Gardner, cross-examined by counsel for defendant, testified that his brother-in-law and no one else was there with him this morning—they two alone; has stated what he claims took place between himself and De Rosier at his house at the time De Rosier was there.

125 Mrs. GARDNER, sworn and examined for the plaintiff, testified that she recollects of De Rosier coming to her house after the accident to her husband; don't remember the number of days after the accident; it was a few days after the accident; a sister-in-law, a sister, and Dr. Bonine were present at the conversation between her husband and De Rosier at that time.

Q. You may state what he said.

A. He said, "Fred.," says he, "how did this accident happen?" Then he went on and told him just how it happened; that he was helping switch cars, he says, "and as I went to pull the pin to lay it upon the deadwood my foot caught in the plank and stopped me there, and the cars shoved me the length of me flat down on my face; of course he didn't talk but a little while at a time, for he was weak and under the influence of chloroform."

Witness says she don't think there was any conversation between them as to how her husband happened to go to these cars; witness showed him the boot; don't know as anybody called for it; showed to show merely how the foot was turned over—how it was caught; the boot of the leg that was gone; De Rosier took hold of it; that is about all there is of that. The boot for the other leg was not shown or called for. There was no damage on the other boot except on the instep; there was a kind of a scratch, as if it had been——

Q. I simply asked you whether the boot from the right leg was shown.

A. No, sir; not at that time.

Witness says the conversation between De Rosier and her husband lasted but a short time.

The witness, Mrs. Gardner, cross-examined by counsel for de-

fendant, testified that she don't know as this matter was talked
126 over particularly between her herself, husband, and counsel; thought De Rosier swore to that that was not so yesterday.

Q. You came here for the express purpose of contradicting Mr. De Rosier?

A. I came here to tell what I know about it.

Q. When was this matter talked over between you and your husband?

A. Last night as we were going home.

Q. You thought Mr. De Rosier didn't tell the truth?

A. Yes, sir; I did.

Q. Then you talked up the matter that you would contradict him, didn't you?

A. You can take it just as you please.

Q. I asked you whether you did.

A. Yes, sir; I did.

Q. You came here this morning for that purpose?

A. I came here to do and say what I was called for.

Q. Didn't you come here this morning for the purpose of carrying out what you and your husband talked last night when you were going home?

A. Yes, sir; I did.

Witness further testified that as to that boot her husband cut it off and put it on the buggy to keep the dirt out of the wheels; didn't think it would be wanted any more; knows a woman by the name of Mrs. Jester.

Q. Do you remember of having conversation with her about your husband's accident?

A. No, sir; nothing more than what she knows herself.

Q. Did you have a conversation with her a few days after the accident and say to her that from Fred.'s story the company was
127 not responsible at all? In this conversation with Mrs. Jester did you say this, or this in substance, that according to Fred.'s story his accident was the result of his own fault, and that the company was in no way responsible for it?

A. No, sir; I didn't.

Q. Or words to that effect?

A. No, sir.

By COUNSEL FOR PLAINTIFF: I will now read the report of Mr. Gardner.

By COUNSEL FOR DEFENDANT: I object. I offered this document for the single purpose of contradicting Mr. Gardner as to the time in the morning of this accident. I offered for no other purpose, and for that purpose it was admitted. There are things in that report that are objectionable and irrelevant and immaterial. I think if your honor will read the document you will come to the same conclusion. I ask your honor to read it before it is read to the jury.

The COURT: "You may read it."

Counsel for defendant excepted, and the report was read to the jury.

Counsel for defendant moved to strike out that part about his family and children. Motion granted, and plaintiff excepted.

Mr. SHOCKLEY, recalled for plaintiff, testified that he went with Mr. Gardner up to the depot at Niles this morning; went to the 5th-street crossing, made measurement in relation to the switch there at the point east of the crossing on the south side; located 18 feet east of the hole he testified to yesterday—the switch was; that he moved the switch; the effect was that you could just see that there was a crack between the rail and the plank for a length of distance 18 feet.

The testimony in the case here closed and the foregoing testimony is in substance all the testimony in the case received on the trial thereof.

128 And said court, upon request of counsel for plaintiff, gave, as requested, to the jury the said several plaintiff's requests to charge, as follows:

1st. It is the duty of a railroad company to provide a suitable place in which its employés or servants, exercising due care, can perform their duties without exposure to dangers which do not ordinarily come within the obvious scope of their employment as usually carried on.

To the giving of which said request of plaintiff counsel for defendant did then and there except.

2nd. It is the duty of a railroad company, as a general rule, to keep its road and all portions of its track in such repair and so watched and tended as to render them reasonably safe for its servants, exercising due care, to work upon.

To the giving of which said request of plaintiff counsel for defendant did then and there except.

3rd. If the jury find that the plaintiff was injured by getting his foot into the cavity alleged in the declaration; that such cavity was a dangerous place and unsafe for defendant's servants engaged in the line of their duties; that plaintiff was not guilty of negligence and was in the lawful exercise of his duties as an employé of the defendant when injured, and that defendant had reasonable notice of the existence of such dangerous cavity when the alleged injury happened, then the defendant is liable.

To the giving of which said request of plaintiff counsel for defendant did then and there except.

4th. If the defendant left the dangerous cavity alleged for an unreasonable length of time before the injury occurred and the same was patent, then the plaintiff is excused from proving express or direct notice to any particular officers of the defendant.

129 To the giving of which said request of plaintiff counsel for defendant did then and there except.

Counsel for defendant then requested the court to charge the jury as in said several requests of defendant numbered from 1 to 16, inclusive, as follows:

The court, giving the requests of said defendant numbered 6, 7, 8

15, and 16, did refuse to give said requests numbered 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14.

1st. This is the case of an employé of the Michigan Central Railroad Company who sues said company to recover for an injury sustained while uncoupling cars at Niles, Michigan, on the 16th day of May, 1882, by which injury he lost a leg while in the service of said company.

It is a suit by a servant against his master while in the master's employment.

The jury are instructed that a servant assumes all the usual risks of the employment, including the risks of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence.

Which said request the court refused to give as requested and counsel for defendant did then and there except.

2nd. When a servant demands from his master compensation for an injury received in his service it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment evidence of any fault on the part of the employer, and if the jury find that any defect existed in the planking of the street-crossing which was cause of the plaintiff becoming injured, notice of
130 such defect must be brought to the knowledge of the employer in season before the accident to have repaired it, and such knowledge, if shown to have existed on the part of any of the fellow-employés of the plaintiff, would not be knowledge to the company.

Which said request the court refused to give as requested and counsel for defendant did then and there except.

3rd. If the jury find that defendant, The Michigan Central Railroad Company, in the transaction of its necessary business had delegated the business of looking after and superintending the condition and repairs of its track as a department of its business to a superintendent of such department, notice of the defective planking in question to him would be notice to the defendants; but any knowledge of such defect, if it existed, only on the part of any of plaintiff's fellow-servants subordinate to such agent who has the superinten-ce and charge of repairs would not be notice to the defendant.

Which said request the court refused to give as requested and counsel for defendant did then and there except.

4th. If the jury find that the planking so alleged by the plaintiff to be defective, whereby he received the injury complained of, was originally, when laid, defective from unsoundness of material or from improper laying, resulting from which was the defect that was the occasion of his injury, then no notice to the defendant of this resulting defect in the planking was necessary; but otherwise and where the machinery, implements, and appliances (in this case the planking) was originally proper and safe for the purpose designed notice of subsequent defects must in all cases be brought to the

knowledge of the proper agents to whom has been delegated the general control and managements of the track and its repairs as the only way to bring the knowledge home to the company.

131 Which said request the court refused to give as requested and counsel for defendant did then and there except.

5th. The plaintiff, being an employé in the service of the defendant, cannot recover unless he shows to the satisfaction of the jury either that the plank in question in the particular alleged was originally defective and unsafe for the purpose designed or that, originally proper and safe, it became defective in the particular claimed to the knowledge of the defendant and which defect defendant neglected to repair.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

6th. If the jury find that the plaintiff knew of this defect when he attempted the uncoupling of the car, in doing which he received the injury, then he could not recover in this case, though it should appear that the defect originally existed, or that defendant, having knowledge of the subsequent defect, neglected to repair it, in such case he is chargeable with contributory negligence.

7th. If the jury find that plaintiff was in the employ of defendant as night switchman at the time of the accident, and that he had been cautioned and instructed by any one having charge or control of defendant's station, ground, and yard at that place not to attempt at any time to couple or uncouple cars, and that contrary to such instructions and caution at this time he attempted to do so and the injury complained of resulted from such attempt, then the plaintiff cannot recover.

8th. The plaintiff cannot recover unless the jury find that the defendant in the matters of the alleged defective planking or in the repair of alleged defects therein neglected to exercise due care, and that the casuality resulted from such neglect of the de-

132 fendant without fault on the part of the plaintiff, one who is injured by the mere negligence of another, who is not guilty of wanton or intentional wrong, cannot recover any compensation if the party injured might by the exercise of ordinary care have avoided the consequences of the other's negligence or wrongful act.

9th. There is no evidence in this case tending to show that at the time of the accident the plaintiff was in the exercise of due care.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

10th. There is no evidence in the case tending to show that the defect complained of was occasioned or permitted to exist by reason of any default or negligence of any officer of defendant or of any servant, employé, or agent of such corporation for whose default or negligence occasioning injury to an employé the defendant would be liable. The verdict of the jury should be for the defendant.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

11th. There is no evidence tending to show that defendant did not use due diligence in the employment of competent servants, or

that it in any manner acted toward plaintiff otherwise than in good faith.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

12th. It is not enough that the plaintiff prove that the defect compail-ed of actually existed as alleged. He must further show (before he is entitled to your verdict) that such defect was occasioned or suffered to exist at the time of the accident through the negligence of some person representing the defendant and who
133 was not a coservant of plaintiff. This has not been shown and plaintiff cannot recover in this action.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

13th. The evidence is undisputed that the plaintiff had been for several years in the employ of defendant in the station yard at Niles, and familiarity with the yard, the track and its appliances on his part is to be presumed, and you are not warranted to find from the evidence that plaintiff's acquaintance with the condition of the track and its appliances left him in ignorance of the defect complained of and at the same time find that defendant was guilty of negligence for not warning him of the existence of and not repairing *of* such defect before the accident.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

14th. It is in evidence in this case by the plaintiff's own testimony that he went between the cars about six feet east of the east end of the planking on 5th street while the cars were in motion and walked westward while the cars were thus in motion between the same, and while thus walking caught his foot and was injured. This act of going between the cars while in motion was contributory negligence on the part of the plaintiff, and your verdict, therefore, must be for the defendant.

Which said request the court refused to give as requested, and counsel for defendant did then and there except.

15th. If the jury find that the plaintiff was not nearer the east end of the planking on 5th street than six feet therefrom west, then in such case it would have been impossible for him to have
134 got his foot caught in the broken plank at the east end of the same, and therefore he cannot recover in consequence of such defect.

16th. The knowledge of the defect in the plank by witnesses Lino and Young would not be knowledge or notice to the company, and their failure or neglect to report said defect to the proper officer of the defendant would not be negligence of the company.

The court then proceeded and gave the following charge to the jury upon its own motion:

GENTLEMEN OF THE JURY: This is an action brought by the plaintiff, Mr. Gardner, against the Michigan Central Railroad Company, called an action on the case to recover damages for an injury

he alleges he received in consequence of the negligence of the company.

The facts, gentlemen, *is* a matter entirely with you. A good deal has been said about a rich corporation upon one side and a poor man upon the other. That, gentlemen, has nothing to do with it. You are sworn here to decide this case according to the evidence as given you by the witnesses and the law as given you by the court. Sympathy upon one side or spite upon the other are things which never enter or never should enter into courts of justice.

It is a mere question of legal right, and upon the evidence and the law you are to decide this case. What the evidence is is a matter for you. The lawyers in arguing the case state their views of the evidence, but you do not take the evidence from them. You must remember it for yourselves.

The court in illustrating the points of law sometimes refers to the testimony, but whatever I shall say about the testimony will be simply for the purpose of illustrating some point of law I may wish to impress upon your minds. You do not take the testimony from the court. The testimony is a matter entirely for you.

135 The weight to be given to each of the witness-s' testimony is a matter also for you.

However, there are certain rules of law by which jurors to a certain extent should be governed in determining the weight to be given to testimony. One thing is the manner of the witness upon the stand; that is a matter for you to consider. Another thing is the reasonableness of the story a man tells, or a woman, whichever it may be—the reasonableness of the story a witness tells. Another thing is the interest a witness may have in the result of the suit.

These are all proper things for you to consider in determining the weight to be given to each individual witness. I have been handed some requests for the plaintiff and some for the defendant. Mr. Coolidge, you may read the 1, 2, 3, and 4. These Mr. Coolidge will read you as the law laid down by the court.

(Plaintiff's 1st, 2nd, 3rd, and 4th requests read by Mr. Coolidge.)

Mr. Stewart, I have given your 6th, 7th, 8th, 15th, and 16th. These you may read.

(Defendant's 6th, 7th, 8th, 15th, and 16th read by Mr. Stewart.)

Mr. Bacon, this request of special fact you wish me to submit to the jury I don't think would be conclusive. They might answer it either way, and it would not disturb a general verdict one way or the other; consequently I don't think it ought to be submitted to the jury.

Negligence, gentlemen of the jury, is a want of that reasonable care which would be exercised by a person of ordinary prudence under all the circumstances, in view of the probable danger.

As I said before, this is an action of negligence, and the burden of proof is upon the plaintiff to show that the railroad company was negligent in this matter.

136 Our supreme court in this State have gone further, and say that it is not only the duty of the plaintiff in such actions

to show the negligence of the defendant, but he must also show that he himself is not guilty of contributory negligence.

Another rule of law in actions of this kind is that the plaintiff must recover upon the allegations in his declaration if he recovers at all. In other words, he alleges this accident to have happened in a particular manner, and unless he has shown you that it happened in that manner, then plaintiff cannot recover.

The plaintiff alleges that while in his duty as a laborer in the employ of the road he undertook to uncouple some cars, and that there was a hole in the plank close to a rail, and he has brought in this machine here for the purpose of illustrating it. He alleges that he got his right foot fast in this hole and that in consequence of not being able to get it out in time his other leg was crushed; that is his theory. Now, it is for you to say whether that is true or not. If that be true, and it was the fault of the railroad company and not his fault, then he could recover. But unless that be true—in other words, if he got hurt in some other way—then, gentlemen, he cannot recover. Consequently the first thing for you to determine is, did he receive this injury in the manner that he alleges in his declaration that he did. He has shown you by this instrument—this machine—that he has brought in here how he claims he received this injury.

On the other side the defendant says that if a man once got his foot into that hole and a railroad car was pressing upon him that it would be utterly impossible for him to get it out; that the car would have pushed upon him, and with his foot fast he would have been obliged to throw himself to the right and break that leg, or throw himself down and be split in two; that is their theory.

137 They claim that it would have been utterly impossible for him to have got his right foot out without his leg being broken.

Did he get injured there as he said he did, or did he get injured some other way?

If you find that the plaintiff did not receive the injury in the manner that he alleges he did that would be the end of the case and there would be no need of considering the case any further. That would be the end of it because, as I said before, he must show to you that he did receive the injury in the manner alleged in his declaration.

Therefore if you find from the evidence that he could not have had that foot fast and got it out without injury to that leg, and it could not have occurred as he claimed it did, that would be the end of the case.

On the other hand, if you find that he did receive the injury as alleged in his declaration, then there are some other questions to be considered; and the next question to be considered would be, Was their road in a reasonably safe condition for the hands to work upon? Railroad companies are not insurers of the lives and limbs of individuals who are at work for them, but it is their duty to keep the places where the hands have to work in a reasonably safe condition.

Where a man goes into the employ of a railroad company or companies of that kind he assumes the risk that is usually liable to the position he takes. [Therefore if he receives an injury without the fault of the company that is his own bad luck, even so far that he cannot recover for the negligence of his fellow- "A." servants, though I don't think that question comes up here. That is my view of it—that the question of the negligence of fellow-servants is not in the case.]

The simple question would be whether the company themselves are negligent.

138 As I said before, the next question would be, Was this road in a reasonably safe condition for the employees to work upon? and that is a fact for you. You have heard the testimony in relation to that matter. As to this hole, you recollect what the witnesses testify about it, what the size of it was, and how it was. If you find that he was injured as he claims he was, and that this road was not in a reasonably safe condition, then the next question is, Had the railroad notice of it? In order to hold the railroad company it would be necessary for the plaintiff to show either that the railroad company had knowledge—that is, its officers who were proper to know about it, that they had been informed of it—or else that the defect had existed for such a length of time as that those whose duty it was to know it were negligent in not knowing it.

It is not claimed here upon either side that any direct notice was given these officers. As to who was the proper officer, I think, gentlemen, if Mr. Doliver, who was the division superintendent, or this man, who was directly under him, if they knew of it or if the hole had existed there for such a length of time as that they were negligent in not knowing it, that that would be negligence of the company, and they would be negligent in not repairing it.

There is no pretence but what the road when it was first made was in a good condition. That was sworn to by a number of witnesses and not contradicted. The question is, Did this road get out of repair and were they negligent in not putting it in repair? Now, the time that a defect of this kind should exist in order to hold the company liable would depend very much upon the nature of the defect. A small hole that would not be seen requires a much greater time in order to hold the company for negligence than if it was a large place that persons could not pass over without discovering it. You recollect the testimony upon that point; you

139 recollect what they said about how long it was; you recollect what the plaintiff said—that he might have passed over it without seeing it; you recollect what he said. My recollection is that he said he might have passed over it one hundred times and not discovered it. These are all proper for you to take into consideration in estimating whether that hole was of such a size and nature that the officers of the railroad company were negligent in not knowing it was there and in not repairing it. These are questions of fact for you to determine.

If you should find that the plaintiff was injured as he alleges, that the place was unsafe, and that the road had a reasonable time so as

to hold them, then the next question would be, Was the plaintiff guilty of contributory negligence; in other words, did he do negligently something which, if he had not done, the accident would not have happened?

It is claimed by the plaintiff that he was ordered by Mr. Bachelor, who had charge at that time, to assist in the coupling cars, and that in consequence of that order and while following those orders that morning he was hurt.

It is claimed on the other ha-d that he never had any such orders; that Mr. Bachelor ordered him directly not to uncouple cars, but to keep away from there because he was in danger, and that he never countermanded those orders; that is what the defendant claims.

It is for you to say where the truth is; if he was there under the orders of Mr. Bachelor or the man who was under him and was following out their orders when he attempted to uncouple the cars, then he would be in the line of his duty; if he was not, he was then in violation of the orders of Mr. Bachelor, then he would not be in the line of his duty; if he was not in the line of his duty, then he could not recover whatever may have been the negligence of the company.

140 Considerable was said in the argument by counsel upon both sides in relation to his undertaking to uncouple the cars while they were in motion. No evidence was offered upon either side as to what was the rule or what was the custom or regulation in matters of this kind; hence I charge you this: That if the plaintiff was not by his employment bound to uncouple cars while in motion, and if it is more dangerous to uncouple them when in motion than when standing still, and if he did uncouple the cars while they were in motion, and if the injury would not have happened if the cars had been standing still, then he is guilty of contributory negligence and cannot recover, and the burden of proof of showing that he was not guilty of contributory negligence our supreme court says is upon the plaintiff. These are all matters of fact for you to determine. If you should find all these facts in favor of the plaintiff and against the defendant, which I have related, then the next question would be the question of damages. If you should find anything for the plaintiff that question would then come up what that should be. In the first place, he would be entitled to his loss of time. You recollect what he said his time was worth and how long he was out of employment; that is a matter that is of easy computation. In the next place, he is entitled to his bodily pain and suffering during this time; that is a matter you cannot compute by dollars and cents, as you would the value of a horse, but you allow him whatever you think he ought to have under all the circumstances. In the next place, he would be entitled to payment for the loss of his limb; that you cannot estimate by proof, but it is a matter entirely for you to say what, under all circumstances, he ought honestly to have to pay him for the loss of his limb. These are all matters for you to determine and they rest with you.

Now, gentlemen, one word in relation to plaintiff's knowledge of that defect:

141 It has been urged by the plaintiff that the fact that defendant's officers—some of them—crossed over there very frequently that they must have known of the existence of that hole. That is what they claim, but it is for you to say whether they should or should not.

On the other hand, the defendant says that this plaintiff was over this road very frequently, and that therefore you should *you* infer that he knew of the existence of this hole. Now, whether he did know of the existence of this hole or not is, under all the circumstances, a fact for you to say. If he did know of the existence of that hole, then he would be careless in going directly where that hole was to uncouple these cars. He should have waited until the cars got past that place, if he knew of that defect, before he went to uncouple them. If he didn't it would not be negligence for him to undertake to uncouple them at that particular place.

I think, gentlemen, I have considered all the points.

If you find for the plaintiff you will say, We find for the plaintiff, and assess his damages at so much.

If you find for the defendant you simply say, We find for the defendant.

Counsel for defendant, at the close of said charge, then and there severally excepted to the portion of said charge embraced with brackets and marked "A."

After which charge the jury retired, and, after deliberating, returned a verdict for plaintiff against said defendant for five thousand dollars.

And inasmuch as none of the exceptions suffered and made to the rulings, decisions, and opinions of the said circuit judge by said defendant's counsel do appear upon the record of said trial and verdict, said defendant, by its said counsel, did — and there
142 prepare the aforesaid exceptions to the said several rulings, decisions, opinions, and instructions of the said circuit judge, who, on the request of counsel for the said defendant, has signed the same this 24th day of November, A. D. 1884.

ANDREW J. SMITH,
Circuit Judge.

EXHIBIT "A."

Michigan Central Railroad Company.

Report of Personal Injury Sustained by —— ——, of the Town of Niles· County of Berrien, State of Michigan.

Employed by the Michigan Central Railroad Co.
Date of occurrence: May 16th, 1882.
Hour of day: Five o'clock and thirty minutes a. m.
Place where it occurred: On crossing at Fifth St.
Cause of accident: By a deficient plank. I think the accident was caused by the men that laid the crossing, but I can't say who put the plank on the crossing. It was not my fault, for I did not know that there was a hole in the plank until my foot caught. My

business was switchman, but had orders from yard master to help do the training.

Fred. Gardner; age, 44 years; served as an employee on the M. C. R. R. for ten years; myself, wife, and seven children.

I am disabled from taking care of my family for life, as I had to labor for a living and have got no education.

Nature and extent of injury: The left leg amputated three inches below the hip joint.

F. Gardner was a sober man and a man of good, sound judgment.

F. Gardner is living at Niles, Berrien Co., Michigan, and is living and doing well.

143 The person was attended by James Skinner, at the request of Dr. E. J. Bonine, and at the date of this report there is nobody in attendance *at the date of this report.*

I certify the above to be a correct statement, made this 21st day of July, 1882, — Niles, Berrien Co., Mich.

his
FRED. x GARDNER.
mark.

EXHIBIT "B."

Michigan Central Railroad Company.

Report Blank.

NILES, *May* 24, 1882.

Statement of John Etzcorn, Night Yard Master, Niles Station.

Date of occurrence: May 16.
Hour of day: 5.30 a. m.
Where: In Niles yard.
Division: Middle.
Caused by: Pulling pin between M. C. car 520 and D., L. & W. blue 1172.
Train: Yard engine.
Engine: 224.
Engineer: Waltz.
Fireman: Johnson.
No. of cars: 4.
No. of loads: 4.

Remarks: In regard to the injuries Fred. Gardner received in Niles yard May 16 I would say the engine was coupled on five cars on south track. I cut one car off; got on top to set brake; the engine started back over the freight-house switch to stop one car on house track; F. Gardner stepped in to pull the pin between
144 M. C. car 520 and D., L. & W. blue 1172. I heard him halloo. I jumped down off the car to give the engineer signal to stop; ran up to Fifth-street crossing; found Gardner lying on the crossing with his left leg badly crushed. He told me that he got his foot fast between the rail and the crossing plank; the brake-beam on the M. C. 520 pushed him half way over the cross-

ing. We picked him up and took him over to the Saxe house and sent for Dr. Bonine.

JOHN ETZCORN.

At a session of the circuit court for the county of Berrien, continued and held at the court-house, in the village of Berrien Springs, on Thursday, the 7th day of February, A. D. 1884.

Present: Hon. Andrew J. Smith, circuit judge.

The court was opened for business in due form.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Case.

The jury heretofore impannelled and sworn in this cause now heard the remaining proofs and allegations of the parties, the arguments of counsel, and the charge of the court, and retired from the bar under the charge of Henry Whaley, an officer of this court, duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time return into court and say upon their oath that the said Michigan Central Railroad Company is guilty in manner and form as the said Frederick Gardner hath in his declaration in this cause complained against it, and that they assess the damages of the said Frederick Gardner, on occasion of the premises, over and above his costs and charges by him about his suit in this behalf expended, at the sum of five thousand dollars.

145 At general term of the circuit court for the county of Berrien, commenced and held at the court-house, in the village of Berrien Springs, on Monday, the thirteenth day of April, in the year one thousand eight hundred and eighty-five.

Present: The Hon. Andrew J. Smith, circuit judge.

The court was opened for business in due form.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. }

In this cause, the verdict of the jury having heretofore been entered and damages of the said plaintiff duly assessed by the said jury at the sum of five thousand dollars, over and above his costs and charges by him about his suit in this behalf expended, which said verdict was entered as aforesaid on, to wit, Thursday, the 7th day of February, 1884, in this court.

And the said defendant having then and there—that is to say, on said 7th day of February, A. D. 1884—been granted an order allowing, among other things, twenty days within which to move for a new trial, and judgment not to be entered until the expiration of said twenty days, and then only in event of motion for a new trial denied.

And it satisfactorially appearing to the court now here that said motion for new trial was denied and that twenty days have elapsed since the entering of said verdict and of said order, now, therefore, on motion of O. W. Coolidge, Esq., attorney for the said Frederick Gardner, it is ordered and adjudged by the court now here that the said Frederick Gardner do recover against the said Michigan
146 Central Railroad Company his damages as aforesaid, to wit, five thousand dollars and interest thereon from the rendition of judgment, amounting to the sum of four hundred and sixty-six dollars, being, in all, damages and interest for the sum of five thousand four hundred and sixty-six dollars, together with his costs and charges aforesaid, to be taxed, and that the said Frederick Gardner have execution therefor.

147 STATE OF MICHIGAN:

In the Supreme Court.

FREDERICK GARDNER, Plaintiff, Appellee,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant, Appellant.

Assignments of Error.

And now comes the defendant, appellant, by Edwards & Stewart, its attorneys, and says that in the record and proceedings in said cause and in the charge and refusals to charge the jury by the court there is manifest error, and said defendant, appellant, specially assigns as error the following, to wit:

1st. The court erred in overruling the objection of counsel for defendant severally made to the following questions put by counsel for plaintiff to the witness Frederick Gardner, to wit:

"From whom did you receive those orders?"

"You may state what Mr. Bachelor said to you there." (Record, 6.)

2d. The court erred in overruling the motion of counsel for
148 defendant to strike out all the testimony of the witness Frederick Gardner detailing conversation between witness and Mr. Bachelor with reference to what Bachelor said to witness about helping Etzcorn about the trains in the morning and what witness said in reply. (Record, 6, 7.)

3rd. The court erred in overruling the objection of defendant's counsel to the testimony of Frederick Gardner detailing conversation between witness and John Etzcorn while helping Etzcorn uncouple cars the morning of 16th of May, 1882, and in ruling it admissible as a part of the *res gesta* to show whether witness (plaintiff) was or not guilty of contributory negligence. (Record, 7, 8.)

4th. The court erred in overruling the objection of defendant's counsel to the following question put by plaintiff's counsel to the witness Frederick Gardner:

"State whether you suffer pain now from the accident." (Record, 17.)

5th. The court erred in overruling the motion of defendant's counsel to strike out the testimony of the witness D. B. Cook as to what others said to him was the place, and which they pointed out to him as the place of the accident to the plaintiff. (Record, 21.)

6th. The court erred in overruling the objections of defendant's counsel severally made to the following questions put by counsel for plaintiff to the witness Charles Ream, to wit:

"Do you know what was afterwards done with that plank where the hole was?"

"When did you do that?" (Record, 24.)

7th. The court erred in stating—commenting upon the two questions last above stated and the answers of the witness thereto—as follows: "If the plank was perfectly right there was no necessity for taking it up, I should judge." (Record, 24.)

149 8th. The court erred in overruling the objection of defendant's counsel to the question of plaintiff's counsel put to the witness Charles Ream, to wit:

"State whether you were directed (this chopping off the plank) by anybody. If so, who?" (Record, 25.)

9th. The court erred in overruling the objection of defendant's counsel to the question of plaintiff's counsel put to the witness John Etzcorn and permitting the answer to said question, to wit:

"Had he been assisting or aiding you for some time back?" (Record, 29.)

10th. The court erred in overruling the motion of counsel for defendant to strike out the answer of the witness John Lino, to wit, "I think they did," answering the question put by plaintiff's counsel, "Did anybody else but you know it?" (Record, 32.)

11th. The court erred in sustaining the objection of plaintiff's counsel to the question put by defendant's counsel to the witness H. G. Perine, to wit:

"When it was originally put down what do you say as to its being a good, perfect crossing for the purpose and place?" (Record, 38.)

12th. The court erred in not permitting the following question, put to the witness H. G. Perine by defendant's counsel, to be answered, to wit:

"Now, sir, will you state whether or not, in your opinion, it is possible for Mr. Gardner to have been injured in the manner he says he was, with his right foot caught, as he says it was, at this point?" (Record, 38.)

13th. The court erred in overruling the objection of defendant's counsel to the question put to the witness H. G. Perine on his cross-examination by plaintiff's counsel, to wit:

150 "Did you give directions to have the plank cut off?" (Record, 41.)

14th. The court erred in overruling the objection of defendant's counsel to the question put by plaintiff's counsel to the plaintiff and witness, Frederick Gardner, on rebuttal, to wit:

"Now you may state the conversation." (Record, 56.)

15th. The court erred in overruling the objection of counsel for defendant to the offer of counsel for plaintiff to read in evidence the report of the plaintiff, Mr. Gardner, and the reading of said report. The said offer as follows:

"I will now read the report of Mr. Gardner." (Record, 61.)

16th. The court erred in giving plaintiff's first request. (Record, 62.)

17th. The court erred in refusing to give severally the defendant's first, second, third, and fourth requests. (Record, 63, 64.)

18th. The court erred in refusing to give severally defendant's fifth, ninth, tenth, and eleventh requests. (Record, 65, 66.)

19th. The court erred in refusing to give severally the defendant's twelfth, thirteenth, and fourteenth requests. (Record, 66, 67.)

20th. The court erred in giving that portion of his charge severally on pages 73 and 74, in brackets, and severally marked "A" and "B."

And for the errors aforesaid the said defendant prays that the said judgment may be reversed and vacated and held for naught.

EDWARDS & STEWART,
Attorneys for Defendant.

151 FREDERICK GARDNER
vs.
THE M. C. R. R. Co.

Proposed Bill of Exceptions.

152 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

FREDERICK GARDNER, Plaintiff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

At a session of said court held at the United States court-rooms, in the city of Grand Rapids, in said district, and in the State of Michigan, on the 16th day of October, A. D. 1888, before the Honorable Henry F. Severens, district judge of said district, presiding as circuit judge, the issue joined between the parties in this cause came on to be tried by a jury of said district, for that purpose duly impanneled, good and lawful men of said district; at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impanneled to try the said issue also came and were then and there duly chosen and sworn to try the issue aforesaid between the parties aforesaid.

And on the said trial, October 16th, 1888, the testimony and evidence, except as in this bill of exceptions doth otherwise appear,

were the same as the testimony and evidence set forth in Exhibit "H," hereto annexed, said exhibit being the printed record used in the supreme court of Michigan and on which said court rendered its opinion, published on vol. 58 of Michigan Reports, commencing at page 584.

153 And of which opinion a true copy, marked Exhibit "I," is hereto annexed, said two exhibits being given in evidence on said trial, October 16th, 1888, by the defendant in this suit, as is hereinafter stated.

And on said trial, October 16th, 1888, said plaintiff produced as a witness himself, and a copy of his testimony in full as given on said trial is as follows:

Q. Mr. Gardner, what is your age?
A. I am 51 in December.
Q. Where do you live?
A. Elkhart, Indiana.
Q. Were you in the employ of the Michigan Central Railway Company in 1882?
A. Yes, sir.
Q. Do you remember the occasion of your losing a leg?
A. Yes, sir.
Q. What day was that—what day of the month and year?
A. The 16th day of May.
Q. What year?
A. 1882.
Q. Where did it happen?
A. On 5th-street crossing.

154 Q. In what city?
A. Niles.
Q. In what county and State?
A. Berrien county, Michigan.
Q. 5th-street crossing of what?
A. 5th-street railroad crossing.
Q. What railroad crosses there?
A. The Michigan Central.
Q. Had you been employed by that company some time before that?
A. Yes, sir.
Q. Well, what did they employ you for?
A. They employed me to do switching for them, from 1881 until the spring of 1882.
Q. They employed you in the spring of 1881?
A. That is, in the fall of 1881 I went switching.
Q. What did they employ you to do in the fall of 1881?
A. I went out in the freight-house. I was in the freight-house first. I worked for Mr. Gregg for ten years.
Q. In the fall of 1881 what did they employ you to do?
A. To attend switches.
Q. Where?
A. At the east end of the yard.

Q. What do you mean by the east part of the yard? East of what?

A. East of 5th-street crossing.

Q. Do you know about how many switches there are in that east part of the yard?

A. Yes, sir.

Q. About how many?

A. I think there was ten switches that I had to attend pretty regular.

Q. How far does that yard extend east of 5th street?

155 A. Well, the yard extends a little——

Q. (Interrupting.) How far?

A. Over a quarter of a mile; then it extends—some tracks run about a quarter of a mile further. It makes about a half a mile that I attended.

Q. Who employed you?

A. Mr. Batchelor.

Q. What is his first name?

A. Ed.

Q. What was his position?

A. Yard master.

(By the COURT:)

Q. What name is that?

Mr. BACON: Edward Batchelor, as I understood it.

Q. He was yard master?

A. Yes, sir.

Q. Well, sir, did he work there nights? Did he work at night?

A. No, sir

Q. What time did you go on duty?

A. 6 o'clock at night.

Q. When did you go off?

A. 7 in the morning.

Q. Had you been there from the time you were employed in the fall of 1881——

A. (Interrupting.) Yes, sir.

Q. (Continuing:) —until this time of this injury?

A. Yes, sir.

Q. Who was night yard master?

A. John Etscorn.

Q. Did he have the same authority as Mr. Batchelor?

Mr. STEWART: I object to that.

Q. What was John Etscorn's business?

A. His business was to see that trains didn't lay in the yard too long nights; that they went out; wasn't detained; see when they had cars to go that they took them.

156 Q. Well, was there any difference between what he did and what Batchelor did?

Mr. STEWART: I object to that as calling for a conclusion of the witness.

Mr. BACON: Well, I will pass it.

Q. What was Batchelor's business?

A. Batchelor's business was to see in the daytimes that the trains wasn't detained in the yard and got out. Then he had the whole yard under his control and all the men that worked under him.

Q. Who had control at night?

A. John Etscorn had control at night after he (Batchelor) left.

Q. When you were employed in the fall of 1881 were you employed to do anything about coupling or uncoupling cars?

A. No, sir.

Q. Or making up trains?

A. No, sir.

Q. Did anything happen in February, 1882?

A. Yes, sir.

Q. What?

A. I got squezzed between the car and the track.

Q. Did anybody—did any of the officers of the road see you and speak to you about that?

A. Mr. Greeg and Mr. Batch-lor did.

Q. What is Mr. Gregg's business?

A. He is the frei-ht sgent.

Q. What did they say to you on that occasion?

157 A. They told me I shouldn't do that any more—I had no business there.

Q. What?

A. Help uncouple cars.

Q. Well, was anything said to you afterwards?

A. Yes, sir.

Q. When; about what time—about how long before this accident?

A. Oh, it was—I couldn't tell just how often it was repeated to me.

Q. Well, about.

A. About two weeks after the accident, as I remember, they told me I should help the boys.

Q. About two weeks before the accident?

A. Yes; after I got sque-zed—the first time thet he asked me to go and help the boys.

Q. Who told you this?

A. Mr. Batchelor.

Q. What did he tell you?

A. He wanted me to help the boys a little when I had time.

Q. Help them about what?

A. Switching and uncouple cars and help couple up.

Q. What did you tell him?

A. I told him I wouldn't do it.

Q. Did you tell him why?

A. Yes, sir.

Q. Why—what did you tell him?

A. I told him that him and Mr. Gregg both told me I had no business there and I shouldn't do it.

Q. What did he say to that?

A. He didn't say anything about it any more.

158 Q. What next took place between you and Mr. Batchelor about it?

A. Then it ran along until April again.

Q. Well, what then?

A. Then he ordered me to help them again; then I told him I wouldn't do it.

Q. What did he say then?

A. Well, then he said I might as well help them as to sit in the sand-house drying sand, if the boys needed my help.

Q. What did you tell him?

A. I told him that I shouldn't help him; that him and Mr. Gregg both forbid me to do it.

Q. Help him what?

A. Help the boys switch, coupling and uncoupling cars.

Q. Well, did he speak to you again after that?

A. Yes, sir.

Q. When?

A. About a week before the accident.

Q. Now, just tell what was said to you then by Mr. Batchelor.

A. A week before the accident happened?

Q. Yes.

A. He told Mr. Kemple to call me back——.

Q. (Interrupting.) Who told Mr. Kemple to call you back?

A. Mr. Batchelor. Then he told me he wanted me to help the boys.

Q. Wanted you to do what?

A. Help the boys coupling and uncoupling cars again.

Q. What did you tell him?

A. I told him then that I wouldn't do it; that he had told

159 me I shouldn't do it. I told him again that Mr. Gregg said I shouldn't do it.

Q. What did he say then?

A. Then he said that I could help him when I had no work of my own.

Q. Well, what did you say to that?

A. I went on and helped them a night or two then; I quit again.

Q. What did you tell him? Did you tell him anything about it?

A. I told him I didn't want to do it.

Q. What did he say to that?

A. He said he would like for me to help them if I had time.

Q. Was there anything said about getting rid of you or getting some one else?

A. It was after the 7th of May.

Q. What was it—what did he say then?

A. On the 7th day of May he gave me orders that I must help them.

Q. Well, what did you say to that?

A. I told him then—I said, "Mr. Batchelor," I said, "you and Mr. Gregg both told me that I shouldn't do it," and he said, "If you can't help them, now we are short of help, the trains are late every morning. We have got to get them cars out and you must help the boys."

Q. What did you say?

A. He said Mr. Walker goes to the west end; that leaves John Etscorn alone.

Q. What did you say?

A. He told me that I had to; that I had to go and do it. He said, "If you don't do it I will get some one that will do it."

Q. Then did you help them?

A. Yes, sir; I helped them from that on.

160 Q. Now, on the morning of the accident what time did you go on duty the night before?

A. 6 o'clock.

Q. Well, sir, what took place in the morning just described? Tell me what first took place in the morning with regard to these cars.

A. Well, the first work in the morning that I done after No. 2 went out I set the switch up, and the yard switch-engine came down and back again; then a way freight came up from the West, I turned one switch on one track and let her up; then I turned it back so she could come down around near the short track; from there she went down in the round-house. Mr. Walker came across from 5th street and jumped onto her and rode down to the round-house; then I went over to engine 224 standing on the south side on 5th-street crossing, and I told the boys that I was going to help John to switch and I wanted them to look out.

Q. Who did you tell that to?

A. The engineer and fireman.

Q. Where were they standing?

A. They were sitting on their seat.

Q. What is the engineer's name?

A. Mr. Walsh.

Q. What is the fireman's name?

A. I couldn't tell you; I never learned the fireman's name.

Q. What kind of an engine was that?

A. I couldn't tell what they called it; it was number 224.

161 Q. Do you know whether——

A. (Interrupting.) It was a freight engine.

Q. How did it come there? Had that engine been there before, to your knowledge, as a yard engine?

A. Not to my knowledge, it had never been in the yard.

Q. What engine had been there as a yard engine?

A. 86.

Q. What kind of a thing is that?

A. What is an engine with air brakes.

Q. Who was the engineer of that?

A. Mr. Sparks that night.

Q. Well, where had this Walsh and his engine been used—employed?

A. On the main line.

Q. Did his engine have air brakes?

A. No, sir.

Q. What kind of employment—what kind of trains had he been running?

A. Freight.

Q. How did that engine arrive there that morning?

A. Passenger engine on number 3 gave out somewheres near Decatur, I believe, and they held him there, and he took his engine and hauled his train to Niles; just took 86 and put it on and they went to Michigan City.

Q. Did Sparks go with it?

A. Yes, sir.

Q. What engine came over there to be the yard engine?

A. 224.

Q. With Walsh?

A. Yes, sir.

162 Q. About what time in the night did that happen?

A. A little after 3 when they got in.

Q. A little after 3 in the morning?

A. Yes, sir.

Q. What kind of a passenger train was that—what did they call it?

A. They called it "No. 3"—"No. 8," perhaps, then.

Q. What kind of a train is it—there are express trains and so on—where does that go?

A. It goes through to Chicago; whether it stops at all stations or not I couldn't tell—whether it was an accommodation or not.

Q. A passenger train?

A. A passenger train.

Q. Did it have sleepers?

A. Two.

Q. Well, sir, now when you spoke to this Mr. Walsh and the engineer in their cab what did you do next? Did they pay any attention to you?

A. No; they never made no answer.

Q. Never did what?

A. Never said a word back to me when I told them. I went right on down the cars towards the west end.

Q. Was it daylight at that time?

A. It was about half a past 5 in the morning.

Q. Well?

A. John Etscorn had just gone to cut one off and was on top of them.

Q. How far west of 5th street was he then?

163 A. Well, only about a couple of rods, when I hollered to him—when I asked him——

Q. What did you ask him?

A. I asked him where he wanted the rest of the cars, and he said one in and one out.

Q. This is John Etscorn, the night yard master?

A. Yes.

Q. Mr. Batchelor hadn't yet come?

A. No, sir.

Q. Well, when he said "one in and one out," what did you do then?

A. I went and set the switch over for the freight-house track; then I went back up along the cars and was going to cut the first car off; it was a blue. I have forgot the number of it; it was about, I should judge, about eight feet above the crossing.

Q. Which way?

A. East of the crossing.

Q. East of the 5th-street crossing?

A. Yes, sir.

Q. On which track was it?

A. On the south track.

Q. How many tracks were there crossing 5th street there then?

A. Five.

Q. This was the one furtherest south?

A. Yes, sir.

Q. This car, you say, was about eight feet from the crossing?

A. Yes. The east end was—or the east end of the car was about eight feet.

Q. From what?

A. From the crossing.

Q. East of the crossing?

A. Yes, sir; the east end of the car.

164 Q. It was in motion?

A. No, sir.

Q. Standing still, then?

A. Yes.

Q. Well, then what?

A. After I set the switch over I went up along and hollered to them to come ahead.

Q. Did you make any signals to them?

A. I made a signal like that (indicating by swinging arm) to come ahead, after I hollered. At first they came very slow, and I stepped in to pull the pin.

Q. Which way was you facing?

A. I was facing west.

Q. Which way was the engine facing?

A. West.

Q. The cow-catcher on it was turned west?

A. Yes.

Q. And you were facing west?

A. Yes.

Q. They were pushing the cars west?

A. Yes.

Q. How many cars were there on that whole train?

A. Five.

Q. Now, what happened next?

A. After I stepped in and took hold of the pin to pull it up it didn't come very easily; I had to give it several motions to get it loose. I got it off. Then, I think, I laid it upon the deadwood; I laid it up there ready to step out. I took my left foot and stepped right up near the rail so I could bring my right around, because I would have to get out, and as I went to bring my right foot it wouldn't come. I stopped and looked down and I seen it was in the hole.

Q. In what hole?

165 A. In the hole in the plank right side of the rail—on the north side of the rail.

Q. In which end of the plank?

A. In the east end.

Q. What kind of a hold did you have? Your foot was in that hole?

A. Yes.

Q. What did you do then?

A. Then I took my left foot and set it right on top of the rail, thinking probably I could get it out in time, and at the same time I found it was fast. I commenced hollering and *and* swinging with my hands like this (indicating) until I fell on the ground as though it pushed me down. Mr. Etscorn at that time heard me holler. He was then pretty near to 4th street; on top of the car.

On page 16 of this record the word "right" was changed and the word "left" substituted in its place. On page 42, in the 9th line from top, the same word was changed in like manner. This correction was made by referring to my notes and in conformity therewith this day, the mistake being made through misunderstanding of operator when notes were dictated to him.

CHAS. H. McGURRIN.

Kalamazoo, Dec. 1st, 1888.

Q. About how far was he off?

A. He was about ten or twelve rods from me.

The COURT: One moment. Where was the engine? Was it to the west or to the east?

Mr. BACON: Yes, sir; it was facing to the west; it was a few feet—a few steps—east of this 5th-street crossing.

Q. Well, sir, what happened then?

The COURT: It was pushing the cars east?

Mr. BACON: Pushing them east—pushing them west—one in and one out; he was pushing them west.

Q. Well, now, what happened when you saw your foot was in that hole—what happened next?

A. I saw my foot in the hole and I took my right foot and set it on top of the rail and began to holler right off.

166 Q. Did you throw your hands up?

A. I throwed my hands up about as far as I could and began to swing out.

Q. Was it where it could be seen from the engine?

A. Yes, sir.

Q. Then what?

A. Then it pushed me down.

Q. What pushed you down?

A. I knew that was behind me and the car struck me; at first the brake struck me on the leg; the car struck me on the shoulder about the same time, then it shoved me 16 feet before the train was stopped, and it shoved me in the middle of the track on the crossing.

Q. What is the length of the crossing there?

A. One hundred —.

Q. What is the width of the crossing east and west?

A. 32 feet the crossing is.

Q. What is the first thing—what was the first injury that you felt?

A. The first injury was my toes.

Q. In your left foot?

A. Yes, sir; in the boot.

Q. What was hurting then?

A. The wheel was pulling my foot, and it ran up the sole and crushed in my toes; I could hear it crush.

Q. What was the next injury that you felt?

A. It was when the brake struck my bone in about here (indicating).

Q. Was the bone broke below the knee?

167 A. That I don't know. I don't remember the bone being broke below the knee; there was a kind of a cold sensation that went over me; I didn't feel any more pain until they broke this bone here (indicating).

Q. What broke that?

A. The brake; when they pulled the car back off of me.

Q. They were going west—what made them turn around and go east?

A. Mr. Etscorn was signalling to run up from 4th street with all his might; when they got the signal they shoved them down quickly and went right back.

Q. How far did they go east before they stopped?

A. I judge they went the length of the car back away from me—maybe two, I couldn't tell exactly; about that distance—before they stopped again.

Q. Was anything done as they were going east—pushing back?

A. Pulling back there was closed on me—was all the bolts that went through the shoe; just stripped it up in strips.

Q. Was any bone of yours hurt as they went back east?

A. As they went back east it broke this bone right here (indicating).

Q. What broke that?

A. The brake-shoe or the beam, I guess; one of the two broke it right in two.

Q. Do you know about how near to the top of the rail is that brake-bar or hanger?

A. Oh, maybe it is—say four inches; but the shoe was near—about an inch and a half from the rail—the shoe itself.

168 Q. What is the shoe?

A. The shoe fits to the beam to hold the cars.

Q. On the wheel?

A. Yes; where it sets the brake.

Q. It is an iron inside of the brake-hose.

A. Yes, sir.

Q. Secured onto the brake-beam by bolts?

A. Yes.

Q. Now, these bolts were projecting through this brake-beam then?

A. Yes, sir; sticking through.

Q. Inside or outside?

Mr. STEWART: I object to that as irrelevant and immaterial.

Mr. BACON: All right. I can prove it by another man.

Q. Well, sir, what was the first that was done with you after the accident there?

A. They put me on a stretcher and carried me to the Sykes house?

Q. Did you see Mr. Kemple there that morning?

A. Yes, sir.

Q. Who came to you and helped to pick you up?

A. Mr. Etscorn was the first man to me.

Q. Who next?

A. Mr. Kemple.

Q. What position did they find you in? Do you know?

A. Well, I was sitting up on the crossing.

Q. When you was sitting up there, did you see anything of this hole?

A. Yes, sir; I could see the hole as I was sitting up, and I says to John Etscorn, "There is the hole I had my foot in."

169 Q. Was you then experiencing any bad pain at that time?

A. No, sir.

Q. Was the bone—any of your bones in sight?

A. This bone here (indicating on leg) was sticking right out, just in that shape; the meat was all tore off, a short piece about an inch and a half or two inches from the joint.

Q. Where was you taken then?

A. Taken me home.

Q. Where?

A. They took me from the Sykes house home.

Q. Was there a doctor there in a little while?

A. Yes, sir.

Q. Who?

A. Dr. Bonine, Dr. Blacken, Dr. Akwood, Dr. Greenmire, and Mr. Bonine's son.

Q. Was your leg cut off by those doctors?

A. It was amputated about half a past 8.

Q. Cut off close to the body, as it now appears?

A. Yes, sir.

Q. How long were you there confined in the house with sickness, ailment, before you got out to do much of anything?

A. Until August, before I was able to get out to do anything.

Q. State whether you suffered pain during that time.

A. At times; not a great many. I suffered more pain since than I did during the time it was healing up.

Q. What has been the truth about the continuence of the pain?

A. I don't know; I couldn't tell what causes it.

170 Q. How long has it continued?

A. Sometimes it continues for three or four days at a time.

Q. Where?

A. Right in my—here (indicating in the region of upper part of limb close to body).

Q. Feel the same as if you had the foot there?

A. Yes.

Q. How often has that thing happened?

A. Well, I had it this winter twice, now.

Q. What?

A. I had two attacks of it this winter; the second time it lasted four days, another time it lasted a week.

Q. How has it been in the last year and the year before?

A. The year before I had three attacks of it, and the year before I left Niles I had two again; I had to call Dr. Avery a couple of times.

Q. What were you earning at the time of this accident?

A. $45 a month.

Q. What, a month?

A. Yes, sir.

Q. Were you in good health then?

A. Yes, sir.

Q. How have you been—how much have you been earning since that, about what rate?

Mr. STEWART: I object to that as irrelevant and immaterial.

Mr. BACON: I will withdraw it.

Mr. UHL: Do you waive it?

Mr. BACON: Yes.

171 Q. State whether the loss of your leg has been any inconvenience to you in the way of getting a living.

A. Yes, sir.

Q. Have you been able to get a living since that, or has your children——

A. (Interrupting.) By my children's help.

Q. Could you take care of yourself?

A. No, sir.

Q. State whether you had anything to do with keeping the track in repair.
A. No, sir.
Q. Were you ever requested to do anything of that kind?
A. No, sir.
Q. Was any instruction ever given to you that you should report any holes or defects in the track?
A. No, sir.
Q. Were you ever hired to do any such a thing?
A. No, sir.

Mr. UHL: Wait a minute. We object. It is already stated that——
Mr. BACON (interrupting): Let that go, then.
The COURT: He stated what the nature of his employment was.

Q. Do you know who did have charge of the track there?
A. Yes.
Q. Who?
A. Mr. Lyno.
Q. What was his office called?
A. He was yard boss under Mr. Dolliver.
Q. What was Mr. Dolliver's office called?
A. Road master.
172 Q. Did this Serrine have men under him?
A. Yes, sir.
Q. About how many?
A. They varied; sometimes six, and sometimes five and six and seven.
Q. What was their business?
A. Their business was——

Mr. UHL (interrupting): I object to that as incompetent.

Q. Had you seen this 5th-street crossing—before you were hurt had you seen it—did you know that crossing?
A. Yes, sir; I knew the crossing.
Q. About how often was that crossing cleaned off?
A. About twice a week.
Q. Who attended to it—whose men?
A. Serrine's men.
Q. Were you ever employed by Serrine at all or by Dolliver?
A. No, sir.
Q. Did either of them give you any instructions ever?
A. No, sir.
Q. Now, about this switch that was nearer to this hole. How near was the nearest switch that was nearest to that hole; how near was it to the hole?
A. Twenty feet.
Q. Did you ever measure it?
A. Yes, sir.
Q. Is the handle of the — that you took a hold of to move that switch south of the track or north of it?

A. It is south of the track.

Q. South of the southermost track?

A. Yes.

173 Q. About how many feet to the south of the southermost one is the handle that you took hold of to work that switch?

A. To the south rail fifteen feet and a half.

Q. How much?

A. About fifteen feet from the south rail to the switch, and to the north rail where the hole was is twenty feet.

Q. And immediately from the nearest part of the rail, the nearest part of the rail to the handle that you took hold of, how many feet was it when you were taking hold of the handle and looked at the nearest piece of the rail you could find—how near was that?

A. The nearest; it wasn't six feet off—right straight.

Q. It was right north of you when you took hold of the handle?

A. Yes, sir.

Q. If you had looked over to where this hole was state whether you would have to look across two rails.

A. Yes; I would have to look across two rails; it was twenty feet.

Q. Now, that switch that was so situated, was it frequently or uncommonly used while you were on duty in the night?

A. It was hardly ever used in the night when I was on duty.

Q. How did that happen to be so seldom used?

A. One was a track for car-repairers to throw in cars that was broken off, and the other track was called the "south bend"

174 track that we throwed in coaches, and our freight-house. That was the only one that was ever used when that train was made up and cars throwed in.

Q. Did any duty of your- require you to attend that before 7 o'clock in the morning?

A. No, sir.

Q. Had you ever seen that hole before the morning that you were hurt?

A. No, sir.

Q. Had you ever heard of it before the morning that you were hurt?

A. No, sir.

Q. Was there more than one hole like that or anything like it?

A. No, sir.

Q. That was the only one?

A. That was the only one; yes, sir.

Q. This car that you had slipped the pin out of, when you slipped the pin, tell us where you were standing when you took the pin out, whether a little further east than the east end of the plank?

A. About eight feet over the planking.

Q. What prevented you from getting a hold on to that car; did you try to hold on to it at all?

A. I did; when I saw my foot was fast I tried to grab it to see if I could hold myself, but I was too far gone, I couldn't reach it.

Q. Then which way did you fall?

A. I fell to the north.

Q. To the north or northwest it was?

175 A. To the north.

Q. You threw yourself as much as you could?

A. I threw myself as much as I could to the north, as much as I could with the right hand.

Q. What became of your foot that was catched in the hole; how did it get out?

A. It was pulled out; I don't know how it was pulled out.

Q. Did any part of the car strike your foot that you know of?

A. No, sir.

Q. Had you had any other business, any trade, occupation, before you were in the railroad's employ?

Mr. STEWART: I object to that as irrelevant and immaterial.

Mr. BACON: All right, I will let that go for the present.

Cross-examination by Mr. STEWART:

Q. Mr. Gardner, when first did you go in the employ of the Michigan Central Railroad Company?

A. The first I went in 1870.

Q. In 1870?

A. Yes, sir.

Q. In what capacity did you go?

A. I went as shoveller, to shovel gravel on the gravel train.

Q. Between what points?

A. Between Pokehagen and Dowagiac.

Q. How long did you do that?

A. I done that two seasons.

176 Q. That would be 1870 and 1871, would it?

A. I went to work in the fall of 1871 for Mr. Gregg in the freight-house.

Q. So you shovelled gravel between Pokehagen and Dowagiac in the years 1870 and 1871, did you?

A. I think that was the two years that I worked for Jim Smith in the gravel train.

Q. Now, then, what did you do next after that?

A. After I left the gravel train?

Q. Yes.

A. I went to work for Mr. Gregg.

Q. In what capacity?

A. Hauling wood in the yard.

Q. Hauling wood in the yard?

A. Yes, sir.

Q. With a horse?

A. Yes, sir.

Q. And cart?

A. Yes, sir.

Q. What did you haul wood for; for what purpose?

A. For the engine—engine.

Q. Where did you pile it?

A. Sir?

Q. Where did you pile it?

A. It stands along the tracks.

Q. At that time the Michigan Central was burning wood mostly in its engines?

A. Yes, sir.

Q. Now, where did you haul this wood from?

A. We hauled it from the south side of the railroad and, at times, from the north side. We had——

Q. (Interrupting.) Hauled it from both ways?

A. Yes, sir; we had stands on both sides.

177 Q. Did you nearly always have to cross the track with your horse?

A. The track I crossed frequently.

Q. In what particular end of the yard at Niles were you confined to in drawing this wood?

A. Most of the time I was employed on the south side.

Q. I mean as to the end, as to the west end; there is a west end of the yard there, is there not?

A. Yes, sir.

Q. Now, which end of the yard did you haul this wood in, Mr. Gardner?

A. The wood we hauled in the old passenger-house that stood there—stand built right by the water tank that we kept filled up with wood.

Q. Was that in the east or west end of the yard?

A. That was in the west end, then.

Q. Now, was there any in the east end?

A. In the east end there was three that we had to keep full.

Q. You attended to all of them at various times?

A. I drove the horse; I had sometimes one man and sometimes two men to help me.

Q. But you were the boss of them?

A. Well, Mr. Gregg was the boss; I was no boss.

Q. You were boss and had charge of hauling the wood and piling it and driving the horse and taking care of the wagon?

A. I drove the horse and took care of the wagon.

Q. And directed what these other men should do?

178 A. No, sir; I never directed them at all.

Q. You didn't, eh?

A. No, sir.

Q. Then they were employed the same as you were, to haul wood, were they?

A. Yes, sir.

Q. Now, those services required you to traverse the entire yard frequently, did it not—that is, to go up and down the yard and cross over it frequently?

A. Yes; I generally drove over with a load of wood.

Q. How long did you continue in this service of hauling wood?

A. Well, I couldn't just tell, but I think it was about a year before I went onto switching that we quit hauling wood. They laid the men all off.

Q. Can you tell me how many years you hauled wood like that?

A. Well, I could if I knew just what time we took all the wood-burners off, but I couldn't tell you when they took the wood-burners off.

Q. After you quit hauling wood what did you then do?

A. I worked in the freight-house.

Q. Do you remember when you went in the freight-house; what year?

A. No; I couldn't just tell the year I was in the freight-house steady, but I was to work in the freight-house off and on. When we had no wood to split I had to go in and help them haul any flour; I would go in and help them haul. How long I was steady in there I couldn't tell.

179 Q. Well, what do you mean by "off and on"?

A. Why, when they got over-rushed and wanted help to load, Mr. Greeg used to call on me to come and help them to load flour and leave the wood stand.

Q. Was that when you were hauling wood or when you were working in the freight-house?

A. That was when I was hauling wood, too.

Q. I am speaking of the time when you left the wood business entirely and went in the freight-house.

A. No; I couldn't tell just exactly how long that was, for I kept no track of it.

Q. What were your duties in the freight-house or what did you do there?

A. Loaded freight and helped load flour or anything that came along.

Q. How much did you get a month in the freight-house?

A. I got ten shillings a day.

Q. What did you get hauling wood?

A. I got the same.

Q. What did you get on the gravel train?

A. We got fourteen shillings.

Q. Now, when you left the freight-house and came to attend switches, when was that?

A. The next fall, 1881.

Q. Do you remember the month?

A. Well, I couldn't just tell whether it was in October or in September.

180 Q. Was your pay diminished or increased when you went to attend the switches?

A. It was increased.

Q. Do you know how you came to receive that employment?

A. Yes, sir.

Q. How?

A. I wanted to go braking on the way freight, and Mr. Gregg told me I could go down and see By. Smith, he was the man that run the way freight, if I could get a job of him; while I was gone Mr. Batchelor came down there to Mr. Gregg and told him he wanted me to attend the east end.

Q. Wanted you to attend the east end?

A. As I came back Mr. Gregg called me and told me what Mr. Batchelor wanted me to attend the east end, and I could be at home, and I shouldn't have anything to do but to attend the east end; it would be easier for me than to work in the freight-house; so I took it.

Q. And that was attending the switches from 5th street east was it?

A. East.

Q. Do you know how many trains a day passed over the Michigan Central railroad at that station?

A. No, sir.

Q. How many freight trains?

A. No, sir.

Q. The Michigan Central yards at Niles had been familiar to you, had they not?

A. Yes, sir.

Q. For a long time before you went to switching?

A. Yes, sir.

Q. It required somebody to take care of those switches,
181 did it not, who was familiar with the switches and the tracks?

A. Well, if a man was familiar with it he could do it better than a man that didn't understand it.

Q. Well, were you familiar with it?

A. I was familiar with it. I had done the like before I went in the yard steady, to go out and help them.

Q. You had done that before you got this steady employment?

A. Yes, sir.

Q. So you became perfectly familiar with the switches and the grounds about there?

A. Yes, sir.

Q. Now, did you ever discover or see any defects in the plank across 5th street?

A. No, sir; I never did.

Q. Did you ever discover any defects with reference to the road or cars while you were in the employ of the company?

A. I didn't understand you.

Q. Did you ever discover any defects with reference to the road or cars while you were in the employ of the company, or breakages with reference to the road or machinery of the railroad company while you were in its employ?

The COURT: That question is rather broad, Mr. Stewart.

Mr. STEWART: It is rather broad, your honor.

The COURT: I think you had better keep right to the issue;
182 that might open the way by and by that something was the trouble at Dowagiac.

Mr. STEWART: No; I confined it to Niles.

The COURT: There is no other fault in issue except as pertains to that particular place right there. I am not interposing any objection on my own motion, however.

A. Oh, I seen some broken cars.
Q. Did you report those to nobody?
A. No, sir.
Q. Did you report any defect?
A. No, sir.
Q. With reference to the cars, road-bed, or other things belonging to the company at this station while you were in its employ?
A. No, sir.
Q. You saw defective machinery, then, while you were in its employ at that point?
A. No machinery I didn't see.
Q. You never made any report of it?
A. Not of broken cars.
Q. Did you make any report of——
A. (Interrupting.) No, sir.
Q. (Continuing:) Anything that was out of order?
A. Nothing out of my line of business, what I had to do.
Q. Did you ever find any misplaced switches while you were there?
A. No, sir.
Q. If you had would you have reported them?
A. If I had found any misplaced switches on my side I
183 would right them.
Q. Well, suppose they weren't on your side.
A. I never was down to the other end to attend them.
Q. What do you say as to whether this plank, so far as you saw and observed, was sufficient for that purpose and for that crossing on 5th street?
A. As far as I saw, it was damaged; there was a hole in it.
Q. How long had you known *of* that hole to have existed there?
A. I hadn't known it at all.
Q. You just said you did know that it was damaged—that you saw a hole there.
A. No, sir.
Q. Where was this hole?
A. On the east end.
Q. How long had it been there; did you know?
A. I don't know.
Q. Well, about how long?
A. I never seen it, so I couldn't tell.
Q. You just said it was there.
A. It was there the morning that I got my foot in it, but how long it had been there before I don't know. I don't know anything about that.
Q. Now, we will say, aside from that hole, was there any other defect in that crossing?
A. I didn't see any.
Q. Did you know of any?
A. I didn't know of any besides that hole. I didn't know of any.

184 Q. How far east of the east end of the planking on this 5th-street crossing was the switch you speak of?

A. The switch from the plank was 18 feet—that is, where the rail worked on the switch-bar.

Q. You said you measured it.

A. Yes, sir.

Q. When did you measure it?

A. Four years ago.

Q. Just prior to the trial in Berrien?

A. Yes, sir.

Q. For the purpose of giving testimony in that case?

A. Yes, sir; now it is only sixteen feet.

Q. What you say?

A. Now it is only sixteen feet.

Q. When did you measure it?

A. I measured it the other day.

Q. Who changed it?

A. When they put new plank in.

Q. How do you know?

A. The plank was there to show.

Q. Did you see them put them in?

A. No.

Q. How do you know they put new plank in?

A. Well, the plank was there; it only measures sixteen feet now; it measured eighteen then.

Q. Is that the way you know?

A. Yes, sir.

Q. Well, how do you know, if they are new plank, they are any longer than they were before?

A. At the time they were cut off—these stand out a little further than the others.

Q. Which were cut off?

185 A. Those plank at that time; they were shorter.

Q. How do you know?

A. I seen where they were cut off—hewed off at the end—because the rails is the same length as they always are.

Q. The switch hasn't been moved, has it?

A. No, sir; the switch stands just where it was in 1882.

Q. Do you know the length of the plank that are used for that crossing?

A. Sixteen feet.

Q. Two tiers, were there?

A. Yes, sir.

Q. So that the plank, then, is 32 feet?

A. Yes.

Q. Now, that is the length of the plank that they have used there ever since they put the crossing down, isn't it?

A. Yes, sir.

Q. You say that prior to the trial at Berrien you measured it and it was 20 feet?

A. It was 18 feet.

Q. 18 feet when you testified at Berrien. Did you so testify?
A. Yes, sir; I guess so.
Q. Now you say it is only 16 feet?
A. Yes, sir.
Q. Are you sure?
A. Yes, sir.
Q. Are you sure you testified that it was 18 feet in Berrien?
A. Yes, sir.
Q. That is, what the switch was 18 feet east of the east end of the plank?
A. That is the switch; the end of the switch-bar that we moved was 18 feet from there to the plank.
186 Q. Now, Mr. Gardner, you remember, I suppose, what your testimony was before, on this morning?
A. Well, I think I can remember pretty near all. It has been four years ago.
Q. You measured it, you say, at that time so as to be able to testify what the distance was?
A. Yes, sir.
Q. And you did testify?
A. Yes, sir.
Q. And your testimony at that time was correct, I suppose, was it?
A. Yes, sir.
Q. Did you not at that time testify that the switch east of the east end of the 5th-street crossing was from ten to twelve feet?
A. The switch at the east end of the crossing?
Q. Yes, sir; the very switch we are now talking about.
A. Ten to twelve feet?
Q. Yes, sir.
A. No, sir.
Q. Well, I will read from page 32 of Exhibit "A," which is stipulated to be a correct transcript of the report of the testimony taken on that trial: "How long had you been attending that switch?
A. I attended it more or less from the time I went to work nights.
Q. How far east of the east end of the planking on that crossing was the switch pump or handle?
A. I should judge about ten or twelve feet.
Q. Ten or twelve feet?
A. I should think about that distance."
187 Now, Mr. Gardner, it was very plain, was it not, or very easy, rather, to see the ends of the plank from that switch?
A. From that switch?
Q. Yes.
A. When you was on the south switch?
Q. No; I mean whether it was or not. I say, was it an easy matter to see the end of the plank from the switch?
A. You could if there was no cars in the way.
Q. How many cars would it take to occupy a space of ten or twelve feet?
A. Well, cars could be pulled over there, and you can stand by and you couldn't see it.

Q. That track was the southermost track of the crossing, was it not?

A. It was the south track.

Q. Clear south, so it would be impossible, would it not, to place a car between you on that crossing so as to shut the view off on the crossing between the switch and the east end of the plank?

A. I was on the south side of the crossing.

Q. Let me show you a diagram (showing witness paper). The switch-bar runs in south, does it?

A. It runs south.

Q. And the track that you were switching on was that track (indicating)?

A. The south track. I was on the north side of it.

Mr. STEWART: I propose to offer this as an exhibit, and I will have it marked now.

Marked Exhibit "B."

188 Q. Now, this map represents the Michigan Central railway track and all of the tracks on the crossing at Niles, does it not?

(Witness's answer to this question was an explanation from the diagram as to the position of tracks, etc.)

Q. Do you recognize that south track as the track that the switching was done on that morning?

A. The switching was done on the south track.

Q. This handle here (indicating) represents the switch-bar, does it?

A. This way; yes, sir.

Q. And these are the rails—this (indicating) is the south rail, with this cross-bar that moves right in here (indicating), does it?

A. Yes, sir.

Q. Now, these; here seem to be two tracks—three tracks, in fact—one running directly eastwise and two running east and southerly. Is that correct?

A. Yes, sir.

Q. Now, where does the southermost of these east tracks go to, into the repair shop, or where?

A. Into the repair shop.

Q. Now, then, where does the next one north go to?

A. That is the "south-bend" track.

Q. What is the next track out?

A. That is what they call the "south track;" it runs apast the freight-house and in the freight-house.

Q. When you first saw Etscorn that morning, indicate on that crossing where you stood.

A. When I saw Etscorn?

189 Q. Yes.

A. I was just walking down to that switch—down to the west end.

Q. Down there in the west end?

A. Yes, sir.
Q. What was being done there?
A. There is where I asked him where he wanted them cars.
Q. And he said, "One in and one out"?
A. Yes, sir.
Q. At that time he had taken off one car himself.
A. He had taken off one car and let it run down the south track.
Q. Down in the freight-house?
A. No; down south—right straight.
Q. The train, then, had four cars attached?
A. Yes, sir.
Q. With the engine east?
A. Yes, sir.
Q. With the nose pointed west?
A. Yes, sir.
Q. Which car was it you were uncoupling?
A. It was the first car; that car up from the west.
Q. The west car?
A. Yes, sir.
Q. What was the car next to that?
A. It was a "Michigan Central."
Q. Do you remember the number—520?
A. I couldn't tell you; no. I don't know as I ever looked at that.
Q. Do you remember what this car was—the first car west and the last car in the line west from the locomotive—the name of it?
A. It was a blue car.
Q. "D., L. & W.," was it?
A. I didn't pay much attention to it.
190 Q. Where with reference to this crossing was the west end of the Michigan Central car that you pulled the pin from?
A. The west end of the Michigan Central car was about ten feet from the crossing.
Q. Ten feet east of the east end of the plank?
A. Yes, sir; west end of the "Michigan Central."
Q. Then it was between the "Michigan Central" and the "D., L. & W." that you walked to do the coupling, was it?
A. Yes, sir.
Q. When you went between it it was about ten or twelve feet east of this point—it left the "Michigan Central" from ten to twelve feet east of the plank?
A. No. The end of the "Michigan Central" west?
Q. Yes.
A. The end of the "Michigan Central" was just far enough to leave from to step in there.
Q. I understand. That was about ten or twelve feet east of the east end of the plank?
A. There was room enough—I said that car was just so I could step in there, and it was over next to the "blue," about eight or ten feet from the crossing.
Q. And you stepped in between the cars at that point?

A. I stepped in there to pull the pin.

Q. And you walked between the cars to where you say you caught your foot?

A. Yes, sir.

Q. From which car did you pull the pin, "Michigan Central" or the car west of it?

A. I pulled the pin from the car west of the "blue."

191 Q. And that you did at once, I suppose?

A. It didn't come right away.

Q. Well, you did it once after you got in there?

A. After I got it pulled up loose the car run faster.

Q. Now, which foot was it you say that got caught?

A. The right foot.

Q. But it was the left leg——

A. (Interrupting.) When I got there (indicating on map) I went to step out, and I looked back and stepped my left foot right up in the rail. Then I was going to bring my right foot out and it wouldn't come. I looked right back and——

Q. (Interrupting.) I understand. Now, that is the first switch, is it not, east of the plank?

A. It is the first switch east of the plank on the south side.

Q. Is there any nearer the plank anywhere on that crossing than this east of the plank in the east end of the yard, than this one that -e have been talking about?

A. Well, I couldn't tell you.

Q. Do you understand my question? I want to know if there was any switch nearer the east end of this planking on 5th street than the one that we have been talking about.

A. This was the only switch on the east end of this track, but there were other switches on the east track. Here (indicating), for instance, there was one.

Q. Where? No; a switch.

192 A. There are two switch-s in the middle of the yard.

Q. Those are what are called "running" switches, aren't they?

A. Yes; but you can move them.

Q. Were they nearer the east end of the planking than this one?

A. Well, I couldn't tell; I could never tell how near they were to the planking.

Q. That is, all the rails constituting the south track were pulled south to connect with both of these tracks that bear off to the south respectively; it moved entirely south?

A. It moved entirely south—the whole thing did.

Q. So when this was pulled over it pulled a little way from the plank on the nirth side of the rail, did it not?

A. Yes, sir; a little.

Q. When Etscorn said "one in and one out" you understood him to mean one car in the freight-house down here——

A. (Interrupting.) Yes, sir.

Q. (Continuing:) And one to continue on this track here?

A. Yes, sir; that meant "one in and one out."

Q. You continued to walk between the cars there while they were going west until you got caught, you say?

A. Until I got the pin pulled out.

Q. Well, until you got caught?

A. I was ready to step out; I had my work done.

Q. How frequently did you use this switch, Mr. Gardner,
193 at this point?

A. I don't know as I ever used it while I was on duty nights.

Q. You never did, eh?

A. Not that I know of.

Q. Are you positive about that?

A. I don't recollect of ever using it. I might have used it a couple of times during the night some time to let the South Bend cars in there, but not to my recollection. It has been so long that I have forgot, but if I did use it I know I didn't use it for any time before the accident, for I hadn't been down in the yard to use it.

Q. These were tracks that were being used every day and night, were they not?

A. Days they were in use more than at night.

Q. Didn't you use them frequently nights?

A. I used the east end——

Q. This was on the east end, was it not?

A. I mean the east-end switch, up near the water tank.

Q. Did you use this switch at all?

A. I didn't. At night the other men did; when there were cars to put in they used it.

Q. I say did you use this switch at all?

A. I didn't use it.

Q. You swear positively to that, do you? (After a pause:) Never mind Mr. Bacon; just answer my question.

A. Well, I cannot swear positively when I used it, but I know I
194 didn't use it for a long time before I was hurt, if I used it—all. I couldn't tell now. I told it in Berrien. You can refer to the book.

Q. Is your recollection as to that switch now, Mr. Gardner, any better than it was when you testified in Berrien?

A. No.

Q. It was nearer the time of the accident then?

A. It was nearer then than it is now.

Q. What do you say as to whether the testimony you gave upon that trial was correct?

A. Well, if I said then that I used it before, if I had used it then—not as I remember now—that I used it.

Q. If you then testified that you used it would it be correct?

A. I suppose it is, if I testified to it that I did; but I don't think I did.

Q. Let me call your attention (reading again from page 32 of Exhibit "A"):

"Q. How many times during the night would you handle that switch?
A. Some nights wouldn't have to handle it at all.
Q. When again you would handle it frequently?
A. When again every five or ten minutes."
Now, sir, did you so testify on the former trial?
A. Well, that is not the first time I mean; that is where you bothered me, in Berrien.
Q. Never mind. That was your testimony on the former trial, was it not?
A. If that is is, why——
The COURT: The question is whether or not you testified so then or not. Did you?
195 A. Well, that is more than I could tell now. I think that my testimony was just as firm then as it is now, for I know that I didn't use it.

Mr. STEWART: I offer this testimony that I read from the former trial in contradiction of his present testimony.

Q. Now, you say that you got caught between the cars in February?
A. Yes, sir; I got squeezed.
Q. And that fact became known to Mr. Batchelor and Mr. Gregg, did it?
A. Yes, sir.
Q. Mr. Gregg at that time was station agent, was he?
A. Yes, sir.
Q. He had charge of the entire——

Mr. BACON (interrupting): You are still asking his opinion. You objected to it very strenuously.
Mr. STEWART: I am cross-examining.
Mr. BACON: We object to the evidence.

Q. Do you know what Mr. Gregg's business was at that time?
A. I knew he was freight agent.
Q. Do you know whether or not he was station agent?
A. Station agent? Yes, sir.
Q. And after you got hurt in February, 1882, both Mr. Gregg and Mr. Batchelor told you never to step between another car?
A. Yes, sir.
Q. Did you testify with reference to what took place after
196 that between you and Mr. Batchelor on the former trial?
A. About our work?
Q. Yes.
A. Yes, sir.
Q. And in that testimony did you testify to another talk and conversation?
A. That him and me had?
Q. Yes.
A. Yes, sir.
Q. And all there was of it?

A. Yes, sir.

Q. And the testimony given on that trial was correct, was it?

A. At Berrien?

Q. At Berrien, yes. (No response.)

Q. Now, in that testimony—and you testified there as to all the times that you did have talks with reference to your pulling pins, did you?

A. As far as I think of, I think I testified to everything then.

Q. And that testimony was correct? (No response.)

Q. You told the entire story at that time, with reference to your being employed as a switchman and your talks with Mr. Batchelor about pulling pins after he had given you instructions not to, on that trial, did you?

A. Yes, sir; I gave it as near as I knew.

Q. And all there was of it?

A. Yes, sir.

Mr. STEWART: Now, then, to contradict the witness on that point, I wish to read the testimony given with reference to his conversation with Mr. Batchelor, reading from page 30, beginning on page 30 of Exhibit "A."

197 "Q. Now, will you state over again the conversation that you had with Mr. Batchelor on the morning of May 7th?

A. On the morning of May 7th?

Q. Well, the evening of May 7th.

A. The conversation was this: He told me that he wanted me to help the boys switch in the morning; said John goes down to the west end; that leaves John Etscorn alone; I have got to have you help him, he said.

Q. Help him switch?

A. Help him switch and couple, make up these trains for South Bend; he said, 'These trains have been late for several mornings.' I says, 'All right, if you want me to do it; you told me I shouldn't have to do it;' he says, 'I must have you do it.' I went on and done the work after that.

Q. That was the last conversation he had with you in reference to doing the work?

A. Yes, sir."

Now, is there anything there about discharging you in case you did not?

A. Yes, if I hadn't done it, he could discharge me.

Q. You say he never done it; you have testified here that he said he would do it.

A. He said he could get some man that would do it if I wouldn't do it.

Q. The testimony given on the trial in Berrien was correct on that proposition, was it?

198 A. Yes; but that is the way he told me, if I didn't do it, why he would get somebody that would do it. I thought I gave it then the same way as I did now. That is just the words he told me.

Q. But you didn't testify to that on the former trial?
A. Well, I thought I did; yes; just as much as I do now.
Q. Etscorn on this morning of the 16th of May, when you were hurt, before you came to him had done his own coupling and uncoupling, had he not?
A. He had pulled cars out of the freight-house.
Q. So before you came to him he had done his own work there?
A. He had pulled the pin out of one car.
Q. Then it was—did he do it himself?
A. He done it alone.
Q. Do you know anything about—had you ever seen this locomotive that came in there that morning that done this switching?
A. I have seen it on the road pulling freight.
Q. How long before?
A. How long before?
Q. Yes.
A. Oh, I couldn't just tell. It passed through there pretty near every other day.
Q. Was it an old or a new locomotive?
A. Well, it wasn't a very new one.
Q. It wasn't, eh; it was an old one, then, was it?
199 A. I don't know how old it was. I couldn't say when it was made.
Q. Mr. Gardner, had Mr. Gregg ever any talks with you about going between the cars and pulling pins after this time that you got squeezed in February, 1882, and before you got injured?
A. No, sir.
Q. None at all?
A. No, sir.
Q. Was he ever present at any time when Mr. Batchelor told you that you must not go between cars any more?
A. The only time that Mr. Gregg was present was when he come to see me at the house.
Q. He wasn't present, then, at any time when Mr. Batchelor told you not to go between the cars and pull pins?
A. Not to my knowledge, he wasn't.
Q. What you mean by "coming to your house" is when you were——
A. (Interrupting.) In February.
Q. (Continuing:) Hurt?
A. I was hurt in February.
Q. What did he tell you then?
A. Mr. Gregg?
Q. Yes.
A. He told me that wasn't my place. I wasn't hired for that. I had no business in there.
Q. And that is the only time he ever told you?
A. That is the only tome Mr. Gregg and Mr. Batchelor were together.
Q. And you say Mr. Gregg never told you that afterwards?

A. No, sir; not—I never heard him say so because I wasn't working under him.

200 Q. What time did you say this accident occurred in the morning?

A. Well, the book says half a past 5, but I thought it was half a past 4.

Q. What book?

A. The book that was printed by the court.

The COURT: I presume he refers to the record.

Mr. BACON: The printed record, as he had a copy of it.

WITNESS: I had a copy of it.

Q. Where did you get it?

A. It was sent to me by somebody; I don't know who. I got it through the post office.

Q. When?

The COURT: It don't matter much.

Mr. BACON: He had it promptly after it was printed so he could see what was going on.

Q. Well, what is the fact as to when you were injured, Mr. Gardner?

A. Well, I suppose the fact is that the time on the book is correct.

Q. Half past 4?

A. Half past 5, but I supposed it was half past 4. I thought that was the statement that I made in Berrien. I see that was half past 5 in there.

Q. Now, when you were picked up on the crossing about how far over the crossing west were you, do you know?

A. Over the crossing west?

201 Q. Yes; from the east end.

A. I was sixteen feet from the east end; I was right in the middle of the crossing.

Q. Right in the middle of the plank?

A. Yes, sir.

Q. And you say the time, as you recollect it, was half past 4 in the morning?

A. I say that is what I thought it was, but I see the book says it was half past 5.

Q. Well, whichever time it was it would be pretty dark, wouldn't it?

A. Half past 4 in May you put the lamps out; you could see all over.

Q. You say that was at 16 feet from the east end?

A. Yes, sir.

Q. At that time in the morning state whether in your condition you could see this hole 16 feet away in the east end of the plank.

A. Yes, sir.

Q. And yet where the switch was, ten or twelve feet away east, looking in the direction of the plank, you couldn't see it at all?

A. Well, the hole was on the north side of the rail. You would have to be on the south side twenty feet; you couldn't see it.

Q. You stood by that switch, didn't you, when you were standing at the switch looking at it from the east end?

A. But I wasn't at the switch; I was in between the cars.

Q. I am speaking of other times when you were working
202 this switch?

A. If I ever used the switch it was nights. I wasn't there any daytimes.

Q. Is there a light about this switch?

A. Yes, sir.

Q. At all times?

A. All the night.

Q. Permanent one?

A. Yes, sir; every night, but the light don't give no light to see anything.

Q. When did you move to Elkhart, Mr. Gardner?

A. Two years ago the first of May—March, I should say.

Q. Two years ago the first of this last March?

A. Yes, sir.

Q. Are you in business there?

A. No, sir; I work for the Elkhart Dipping Company factory.

Q. Had you employment engaged before you went there?

A. I had for the children.

Q. What do you say?

A. We had for our children.

Q. Any for yourself?

A. No, sir; not at that time.

Q. How long before you went to Elkhart to live had you contemplated going there?

A. How long before?

Q. Yes.

A. From New Year's I made up my mind to go over there.

Q. From New Year's. From New Year's, 1886, was it?

A. I think that it was in 1886 we made up our minds, if we could get some employment for our children, some place.

Q. What were you doing at Niles before you removed to
203 Elkhart?

A. I was peddling milk.

Q. On your own account, I suppose?

A. Yes, sir.

Q. Have you any property in Niles?

A. No, sir.

Q. When did you sell that?

A. I sold o-t in the fall of 1886.

Q. 1886, or '87?

A. It will be three years this fall since I sold out.

Q. Three years this coming fall?

A. Yes.

Q. That would be in 1885?

A. It is three years this fall since I sold out. This is 1888, ain't it?
Q. Yes.
A. Then it is 1885, then.
Q. Were you living at Niles, do you remember, when the decision in your case was made by the supreme court?
Mr. BACON: We object, unless he sees the record.
Mr. STEWART: I simply asked him if he remembers hearing of it.
Mr. BACON: All right, I will let it go.
A. I don't remember whether I was at Niles or Elkhart.
Q. I didn't ask you that. I asked you if you remember having heard shortly after the case was decided in the supreme court.
A. I couldn't tell what the season was—what time of year it was.
Q. I am not asking you what the season was or the time of year. I asked you if you remember having heard that it was decided in the supreme court.
A. Yes; I heard of it.
204 Q. Now, where were you living at that time?
A. I lived at that time in Niles.
Q. Do you remember about what time in the year it was?
A. No, sir.
Q. Do you remember the year?
A. No; I couldn't tell you that, either.
Q. How long after that was it that you moved to Elkhart?
A. Well, that I couldn't tell you, for I don't know; I couldn't tell you when it was decided.
Q. What, sir?
A. I couldn't tell you when it was decided; so I don't know.
Q. Couldn't you tell about how long it was you went to Elkhart after you heard it was decided?
A. No, sir; I couldn't tell you that either, for I don't know.
Q. Did you have any conversation with Mr. Bacon?
A. No, sir.
Q. About the decision?
A. No, sir.
Q. None at all?
A. Not with him.
Q. With Mr. Coolidge?
A. Mr. Coolidge told me he seen it in the papers that it went against my—th-t is, he told me.
Q. Well, did you have any talk with anybody about going down to Elkhart to live after that?
A. No, sir; not with them.
Q. With anybody?
A. My brother-in-law; I told him I was going to Elkhart.
205 Q. Did you tell him what for?
A. I told him I was going over to get work for my and my children, if I could get it, and my wife, a couple of weeks beforehand, went over there to see if she could get work.

Q. Had the subject of your going to Indiana to live been talked between you and Mr. Bacon or your attorneys at all?

A. Well, that I don't know; I can't recollect if there was anything said before we went to Indiana or not.

Q. You don't know?

A. No, sir; I can -ot swear to that.

Q. Do you remember when judgment of nonsuit was taken in that court in Berrien against you?

A. To Berrien?

Q. In Berrien.

A. No, I don't; I don't know; I couldn't swear when it was taken out.

Q. Will you tell us why you allowed judgment of nonsuit to be taken against you in that court?

A. Why?

Q. Yes.

A. Why I did allow it to be taken there?

Q. Yes.

A. Yes, I will tell you now; I had it taken out; I ordered it carried up to the United States court.

Q. Who advised you to?

A. At that time Mr. Bacon did.

Q. Did he tell you why you should do it?

A. Well, I couldn't tell you what the conversation was between him and me at all.

206 Q. Tell us what you can remember.

A. He said there was no use of fooling in the Berrien court with it.

Q. He told you there was no use of fooling in the Berrien court with it. Why?

A. Why, he said if I got a judgment they carried it to the supreme court again.

Q. What did he say about Indiana in connection with that?

A. Well, he said if I went to Indiana—if I was in Indiana at that time and staid there, was going to make it a permanent home, that I could sue the company in the United States court, but if I didn't stay there and intended to come back I couldn't do it.

Q. How long before you went to Indiana to live was this talk, or part of it—the first talk that you had?

A. I don't know that we had any talk before I went.

Q. Well, with anybody else about it?

A. No, sir; I don't recollect exactly of having any talk with anybody until after I lived there a month or two months.

Q. What?

A. I don't know as I had any talk with anybody beforehand.

Q. Will you swear positively that you did not?

A. Yes; I think I can swear positively I have no recollection of talking with anybody before I moved to Indiana.

Q. But the decision of the supreme court of the State of Michigan you had heard of before you did go?

A. Yes, sir.

207 Q. Now, where did the first conversation between you and Mr. Bacon occur as to your residence in Indiana or going to Indiana to live?

A. Well, that I couldn't tell where it was.

Q. What was said by Mr. Bacon about your living there permanently, if anything?

A. In Indiana?

Q. Yes; in Indiana.

A. Why, he said if I made—went to Indiana and lived permanent to make it my home there that I could sue the railroad company in the United States court; and if I didn't I couldn't.

Q. That you would have to go to Indiana and live permanently?

A. Yes; and I would have to make it my home there.

Q. Then, how long after that was it that you went there?

A. Well, it appears to me I was there.

Q. Now, then, let us be sure. How long after that talk with Mr. Bacon was it before you did go there to live, in round numbers; I don't care as to the date?

A. I don't recollect; I couldn't tell whether it was before I had any talk with him before I went, or whether it was after.

Q. Was it a week, or a month, or two months?

A. I couldn't tell whether it was after or before. When I came back in about two months I remember of having a talk with him.

208 Q. I am speaking now with reference to the very first talk you had with him, not the second or third, but the first talk you had with him.

A. Well, that I cannot recollect, as to the first talk.

Q. How long was it before you heard of the decision of the supreme court?

A. He had no talk with me before the decision of the supreme court.

Q. Well, how long after?

A. Well, that I couldn't tell you either.

Q. Where was this talk; in Mr. Bacon's office?

A. No, sir.

Q. Where was it?

A. If I seen him anywhere it must have been somewhere on the street, because I — never been to Bacon's office——

Q. Never been to Bacon's office?

A. (Continuing:) —until here lately.

Q. Mr. Coolidge had charge of this case in the State court?

A. Yes.

Q. And his name appears here now as one of the attorneys, does it?

A. Yes.

Q. Who did you have these talks with mostly after the decision, Mr. Coolidge or Mr. Bacon?

A. Well, there was but very little said about it by either of them. There was little to say on the subject after they told me it was decided against me.

Q. Who suggested that you might go to Indiana and have a new deal?

A. They told me if I lived in Indiana, to make my permanent home there and never intended to come back, that I could
209 sue the company in the United States court.

Q. Now, I ask you again about how long was it before you went there that this talk occurred.

A. I told you that I didn't know whether it was before or afterwards. I don't know that I talked with them before I went to Indiana. I couldn't tell you.

Q. You wouldn't be positive, would you?

A. No; but I know after I came back in a couple of months, then I had a talk with them.

Q. Where did you go to have this talk?

A. At the time I met Mr. Bacon in Mr. Coolidge's office I went in to see Mr. Coolidge.

Q. In Mr. Coolidge's office?

A. Yes; we met there.

Q. Well, how much property had you taken to Indiana at this time when you came back after having been there two months?

A. I had all my household goods—everything I had.

Q. At that time?

A. That is all I had, was my household goods.

Q. Now, was there any consultation between you and Mr. Bacon and Mr. Coolidge, you and either of those attorneys, after the discontinuing of the case in Berrien, after the decision was known of the supreme court?

A. Well, I think there was some talk between him and me—Mr. Coolidge. I asked Mr. Coolidge if there wasn't some other way without having it in Berrien again.

210 Q. What was said?

A. Mr. Coolidge told me there was only one way that we could carry it up. I asked him how that was, and he said the only way would be that I was to move out of the State. That was the words of Mr. Coolidge.

Q. Move where? Did they tell you?

A. What?

Q. Where did they tell you you should move to?

A. They didn't say where; if I went to Ohio or Indiana or where.

Q. Well, now, then, how long after you had first heard of the decision of the supreme court was this talk between you and Mr. Coolidge, in the presence of Mr. Bacon?

A. Well, I guess Mr. Bacon wasn't there at that time. Mr. Coolidge and me was alone.

Q. Was it the same day that you heard of the decision of the supreme court or the next?

A. No, sir; it was quite a time after that.

Q. How long?

A. Well, I couldn't tell. I know I went down to his office to see him at one time.

Q. For what hours in the day?

A. From 6 in the evening until 7 in the morning.

232 Q. Where in the yard were you employed mostly?

A. At the east end from 5th street east.

Q. State whether you had any arrangement with the manager of the yard with reference to your duties there; if so, state when and where and what he said.

STEWART: I object to it as hearsay and irrelevant and immaterial.

(Ques. withdrawn.)

Q. You may state what you did there in that yard during the month of May, prior to the time you left the employ of the company.

A. From the 7th of May until the 16th I helped make up trains in the morning when I had nothing to do of my own work. My work was to tend switches for the trains from the east and

233 west and see that they got water and went out, and see that I had the switches right; that was my work; when my work was done I had orders to help the boys in the yard to make up trains.

Q. From whom did you receive those orders?

A. From Mr. Batchelor.

STEWART: I object to that as hearsay, irrelevant and immaterial. I move to strike it out.

(Motion overruled, and defendant excepts.)

Q. You may state when you received those orders.

A. On the 7th day of May, about half past six o'clock.

Q. You may state what Mr. Bachelor said to you then.

STEWART: Same objection—irrelevant and immaterial.

Q. State your conversation with him.

STEWART: Same objection.

A. On the 7th day of May——

STEWART: Same ruling, I suppose?

(Obj. overruled, & def't excepts.)

234 Q. You may state the conversation.

A. On the 7th day of May, in the evening, as I went to work after I got my lantern, the train came, and I went from the baggage-room up to the water tank and jumped on the water tank. Mr. Bachelor came on the south side and turned the water pipe and turned the water on and waited until I came down. Then he says to me, Fred., I want you to help the boys in the morning. He says, John—that is, John Walker—goes down to the west end. That leaves John Etzcorn alone, and he cannot do the work alone. I want you to help him. I says, All right. I says, You told

235 me once that I should not do this work. I had nothing to do with it. Well, he says, I cannot help it now. The trains

don't get off in the morning. The South Bend train is late pretty near every morning. We have not got men enough to get the cars ready. You must help him. I says, If that is the case, that I must help him, I suppose I will have to do it. From that I went on and helped the boys every morning until the accident—that is, when I had no work of my own. There was no train that morning in the yard except——

Q. After that talk what did you do?

STEWART: I move to strike out all this conversation on the ground that it is hearsay.

(Motion overruled, and defendant excepts.)

236 Q. How long had Mr. Bachelor had charge of the yard, as near as you can recollect?

A. As near as I can judge, 5 or 6 years; it may have been longer. I cannot tell. He had been that length of time anyhow.

Q. Who were you employed by?

A. By Mr. Bachelor.

STEWART: I object to that.

A. The railroad company employed me, but I was under Mr. Bachelor.

Q. Who employed you as night switchman?

A. Mr. Bachelor did.

Q. From the time you were employed by him did you continue under him?

A. Yes, sir; under him.

Q. Until what time?

A. Until the 16th of May, 1882.

Q. From the 7th of May state what you did in carrying out those orders.

STEWART: I object to that as calling for a conclusion.

237 Q. State what you did there from the 7th of May.

A. I helped the boys couple, turned switches for them, cut off cars for them in order to get the work done in the morning, and let trains out and in from the East and West, and getting water. That was my business.

STEWART: State that over again.

Q. State it slow.

A. I helped the boys in the morning make up the trains, turned the switches, helped them couple up the cars, let trains out and in from the West and East, and give them water, so the trains would be ready to go.

Q. Was Mr. Bachelor present when you were making up these trains?

A. He was pretty near every morning from that time on.

238 Q. Did he make any objection to your work?

A. Not at all, sir.

Q. You may state now what happened on the 16th of May, 1882.

A. On the morning of the 16th of May, about half past four o'clock, the way freight came in from the west. I turned the switch to let her go on the other track. One of our night men, John Walker, jumped on the engine and went down to the west end and I went over on the south track where the train stood with four cars. I went up to the engineer and says to him, You be careful, I am going to help John switch; I am going to help John switch. He was second night boss then.

STEWART: Who said that?

239 A. I did; said it to the engineer; that he should look out, for I was going to help John switch.

Q. Go on.

A. The train then pushed down over the crossing towards the west. John had one cut off and got on top to hold it. I asked him where he wanted the other.

STEWART: I object to any conversation.

Q. Leave out the conversation with him.

A. I asked him where he wanted the other.

COURT: In cases of this kind, where a man sues a company for negligence, the Supreme Court have held that it is incumbent upon him to show that he was not guilty of contributory negligence. Whatever this man did at that particular transaction, it strikes me, is part of the *res gesta* to show whether he was negligent or not.

240 (Defendant excepts to the ruling.)

Q. Go on.

STEWART: Who did you talk to?

A. John Etzcorn.

COURT: What was his business?

A. He was night boss. He was under Bachelor, but he was in the yard nights over us fellows; night boss of the yard.

Q. Go on and tell what happened.

A. I asked him where he wanted these cars.

STEWART: This is under the same objection and ruling.

COURT: Yes, sir.

A. He said one in and one out; that meant——

COURT: Never mind what it meant.

STEWART: Go on and give it.

Q. State what it meant.

A. It meant one on the freight-house track and one on the south side. I set the switch over and motioned the engineer ahead and stepped in——

241 Q. State the condition of the train; how many cars there was.

A. Four cars ahead of the engine.

Q. Which way were the cars and which the engine?

A. The engine was backing up. As she came ahead she pushed the cars ahead of her. I stepped in there about 6 feet, I should judge, above the crossing, my left foot inside and the *n*ight foot out; took my right hand and laid it on the edge of the car; pulled the pin with the left and laid it up on the deadwood.

Q. What is the deadwood?

A. It is a block that is in front. The iron bolts goes through to hold up the draft iron, to keep the draft iron from coming down on the ground.

242 Q. Go ahead then.

A. As I had the pin pulled ready to step out—to bring my left foot outside the rail—after I had set it down I went to lift my right foot and it was fast; I stooped over and looked back to my foot where it was and it was in that hole—under that plank. I took my left foot and set it back on top of the rail right by my right foot. I didn't know but I could pull it out, but I didn't have time enough to do it, and the car caught me in the back and the brake caught me in here and throwed me down and shoved me 16 feet before I ever stopped. Mr. Etzcorn heard me hollow and jumped
243 off the car and hollowed for them to stop; they pulled the train back and I turned over on the crossing and set up; I says to Mr. Etzcorn, It is broke off pretty short.

COURT: The conversation would not be material.

STEWART: I move to strike it out.

COURT: Yes; strike it out. When anything is stricken out you will pay no attention to it.

Q. Where was this hole?

A. On the east end of the plank.

Q. Where, with reference to the track or rail?

A. It was the north rail of the south track.

Q. You may state what street crosses there.

A. 5th street.

Q. Which way does it run?

A. North and south.

Q. Which way from the depot is it?

A. The east end.

244 Q. You may state what kind of rails are used there.

A. Same kind of rails as that.

Q. Same kind of rail that is?

A. Yes, sir.

Q. Which rail was this?

A. North side of the south track.

Q. You may state the width of these planks.

A. These planks was a foot wide.

Q. What thickness?

A. Four inches.

Q. What is under the plank?

A. Ties.

Q. You may state the shape of the hole as near as you can.

A. From what I could see of it, it was in the shape of a boot-

jack; what I could see at the time it pushed me down; of course I could not see exactly. I saw most of it after I sat up. I saw
245 the hole was open then. When I was fast my foot was under it. I could not see anything of my foot only my instep. I could see that.

Q. How long were these plank from east to west, would you judge?

A. The crossing is 32 feet long—two lengths of plank; the plank 16 feet long.

Q. The hole was on the northeast corner?

A. On the northeast corner.

Q. You may state whether that was a place where a good deal of business was done.

A. There was a good deal of travel done over it by the railroad boys; done lots of work on that track.

Q. Did passengers go over there too?

A. No passengers hardly ever traveled over there; they went over 4th street.

246 Q. I understood you to say this was the north rail?

A. North rail on the south side.

Q. And the hole was on the east end just as it stands there?

A. Just as it stands there, if that lies east and west. I am turned around. I don't know how the country is here. The south rail comes over here.

Q. You may state what happened after you were injured—what was done with you.

A. They took me up and carried me over to the Saxe house; from there they took me home. I don't know how long it was; whether it was half an hour or an hour. I don't remember.

Q. Was a physician employed?

A. There were two at the depot that was sent for, I be-
247 lieve—Belknap and Bonine. I saw them. How many more I don't know.

Q. What did they do?

A. At the house they amputated my leg. I don't know as they done anything at the depot.

Q. Were you insensible at the depot?

A. I don't recollect much of anything for about half an hour, I guess.

Q. Was the amputation a short time after the accident?

A. I don't know how soon.

Q. How long were you confined to the house?

A. About ten weeks.

Q. How long were you under the surgeon's care?

A. Not any more than four.

Q. About four weeks?

A. Not any more than four.

Q. Were you able to do any work?

248 A. No, sir.

Q. You may state how long it was before you were able to do any work.

A. I never went to work until the first of August—that I commenced doing any work.

STEWART: What year?

A. 1882.

Q. You may state what your time was worth at that time.

STEWART: I object to it as irrelevant and immaterial.

Q. In the business in which you were employed.

A. $45 a month.

Q. You were getting $45 a month from the road?

A. Yes, sir.

(Last question withdrawn.)

Q. I will ask him just what he was getting on the railroad. Put it that way.

COURT: He has already answered that.

STEWART: I didn't hear the answer.

249 COURT: How much were you getting from the railroad at that time?

A. $45 a month.

Q. You may state who dressed and nursed the wound.

A. For the first two weeks Dr. Bonine dressed it; after that my wife took care of it.

Q. You state whether you ever noticed this hole before this injury.

A. No, sir; never did.

Q. Did you know it was there?

A. No, sir.

Q. Had any person told you it was there?

A. No, sir; never had no chance to know it was there.

Q. State why.

A. I worked nights and slept daytimes; never went to work until six o'clock in the evening; never had no chance to know of

250 anything of that kind being there.

Q. Who had charge of the road-bed there at that time?

A. Of the crossing?

Q. Yes.

A. On the 16th of May, 1882, Mr. Doliver; he was the overseer of it.

STEWART: I obj. to that and ask to have it stricken out on the ground that it calls for a conclusion.

Q. Just state what his position was.

A. His position was road master—second road master.

Cross-examination by Mr. STEWART:

Q. Mr. Gardener, you say you had been in the employ of the Michigan Central Railroad Company on the 16th of May, 1882, for 12 years?

A. Yes, sir.

251 Q. At and about the Niles station?

A. Yes, sir.
Q. Was you familiar with the station grounds at Niles?
A. I was for the last years back. I was not at first when I commenced there.
Q. Did you grow to be familiar with the station grounds at Niles?
A. Yes, sir.
Q. What year did you go into the employ of the company?
A. I think it was in the fall of 1860—in the spring. It was in the spring of 1860, when the gravel train started.
Q. Do you mean the spring of '60?
A. Yes, sir—no. '70, I should say.
Q. In the spring of '70?
A. Yes. sir.
Q. On the gravel train?
A. Yes, sir.
252 Q. Where did that gravel train do its work—between what points?
A. We done our work hauling away gravel from Pokagon—hauling it down to New Buffalo.
Q. From Pokagon to New Buffalo?
A. Yes, sir.
Q. What were your duties while with the gravel train?
A. First I used the shovel; after that I got promoted to a brakeman.
Q. How long did you shovel?
A. I shoveled about three months in the beginning.
Q. Then how long were you brakeman?
A. I was brakeman until I quit the job—until I went to work for Mr. Gregg.
Q. When was that?
A. That was in the—I forget just what month it was I quit.
253 Q. I don't care to the minute the season of the year.
A. It was in February I quit; no, it was not. It was the time we had a big snow fall—just before the gravel train laid off.
Q. What year?
A. 1872.
Q. '72?
A. I think it was in '72.
Q. How many months did you work on the gravel train?
A. When I quit?
Q. Yes.
A. It has been so long ago I could not tell you how many months; didn't keep track of it.
Q. About how many?
A. I think in '72 I worked about 9 months on it.
Q. Then you went into the employ of Mr.——
A. Mr. Gregg.
Q. Mr. Gregg was then and is now the station agent?
A. Yes, sir.

254 Q. Do you know whether Mr. Gregg has general supervision of all the employees at that station?

A. He had at that time—had the running of the yard and the freight-house. He had the overseeing of the yard and freight-house at that time.

Q. That would include, then, the overseeing of Mr. Bachelor and Mr. Etzcorn and yourself?

A. Mr. Bachelor was not there at that time—when I went there. He came after that.

Q. You are speaking of the time when you went to work?

A. Yes, sir; when I went to work there.

Q. You continued in that capacity how long?

A. I worked for Mr. Gregg from that time on until '81;
255 Oct. or Nov.; I don't know which month it was I quit him. I think it was in October.

Q. Under the immediate supervision of Mr. Gregg, what were your duties there?

A. My duty was to haul wood with a horse and wagon to the stands to wood up the engines; to help get water and go into the freight-house and help load flour into the cars.

Q. One of your duties was to haul wood?

A. Yes, sir.

Q. That was for what purpose?

A. To burn on the engines.

Q. To feed the engines with?

A. Yes, sir.

Q. Whereabouts were these stands located that you hauled the wood to?

A. There was one on the west end of the passenger-house and there was another one right east of the passenger-house,
256 where the old baggage-room used to stand. Then there were more up where the stand-pipe now stands. There was another shed right across from the west end of the other stands, with rails laid, and the cars run to it. We had to fill them and run them out so that night trains could get the wood.

Q. Where did you get this wood from generally?

A. We hauled it out of the yard, sawed up.

Q. Haul any of it out of cars?

A. Towards the last years we did.

Q. In doing that business you had to cross and recross the tracks, did you not?

A. Yes, sir.

Q. Sometimes lengthways with the tracks?

A. Yes, sir.

257 Q. Sometimes attended switches, I suppose, even while you were doing that work?

A. Never without I was ordered.

Q. But you were subject to all orders of that nature?

A. Yes, sir.

Q. Also coupling and uncoupling cars, I presume, during that time?

A. Not at that time.

Q. You hadn't done any of that?

A. Not at that time; I did in a few years afterwards; I had to do it.

Q. I mean while you were in the employ of Mr. Gregg.

A. Yes, sir; he would frequently send me. I had to do that in other men's places.

Q. Considered that that was one of the duties you were to perform?

A. I had to fulfill when I was told to do it.

258 Q. You were then in the employ of the company as a general hand?

A. Yes, sir.

Q. About the yard, freight-house, and switches?

A. Yes, sir.

Q. And thus became familiar, I suppose, with the railroad business and tracks at Niles?

A. Yes, sir.

Q. You were aware, I suppose, that the railroad business was more or less dangerous?

A. I was always careful in doing my work.

Q. But it is a dangerous business anyway, is it not?

A. It is with some people.

Q. Is it as safe a business as farming?

A. As far as that is concerned I don't know.

Q. You don't know whether railroading is considered dangerous business or not, I suppose?

259 A. Railroad business is not dangerous provided everything is safe under your feet.

Q. If everything is safe under foot, then there is nothing about the railroad business that is more dangerous than any other business. Is that what you mean?

A. A man is liable to get his hands and arms taken off too.

Q. Is that a dangerous business where a man is liable to have his hands and arms taken off?

A. I should think it was.

Q. Then the railroad business is a dangerous business general-, is it not, Mr. Gardener?

A. Generally, I should think it was a dangerous business if a man don't look what he is doing.

260 Q. And so regarded, is it not, by everybody—by yourself?

A. The business I was employed in was not dangerous to do.

Q. It was about the tracks at all times crossing and recrossing, was it not?

A. My business when I was hurt was switchman—tending switch. There was no danger about that.

Q. Then, do I understand you to say that you were not in the exercise of your duty when you were hurt?

A. Yes, sir; I was in the exercise of my duty that I was told to do.

Q. When were you told?
A. On the 7th of May, 1882.
Q. On the 16th day of May was Mr. Gregg still there in the employ of the company?
A. Yes, sir.
261 Q. Had general charge of the station, had he not?
A. Of the station, not the yard any more.
Q. Not the yard?
A. No, sir.
Q. How do you know he hadn't charge of the yard?
A. Because he didn't hire me. Bachelor hired me.
Q. Is that the only way you know that Mr. Gregg didn't have general charge of the station, yard, and all?
A. That is the only way I know. He didn't appear to have any say over us fellows.
Q. Hadn't Mr. Gregg frequently given you orders during that period of time?
A. No, sir; never after I left the freight-house. He never gave me orders to do anything of that kind.
Q. Hadn't he frequently told you never to undertake to couple cars?
262 A. He never did but once.
Q. When was that?
A. That was in February.
Q. The 17th of February?
A. In Feb. I don't know what day.
Q. What year?
A. In '62; '82 I should say.
Q. What was the occasion of that?
A. I was helping a brakeman one morning to hold a car, unfasten it with a chain off from the engine, and the engineer pulled the lever back and let the engine run back and caught me. After Mr. Etzcorn took me home Mr. Bachelor and Mr. Gregg came and told me that was not my business. I told them I knew it; I just done it to help the fellow hold the car. They said that was
263 all good enough, but rather than have me get hurt I should let the car go and let the brakeman attend to it.
Q. You say on the 16th of May an engine came from the east with a freight train.
A. Four cars ahead of it.
Q. How far had it come that way?
A. We putted them out of the freight-house with our switch-engine—switch-engine in the yard; we putted the cars out of the freight-house.
Q. How many cars were there?
A. Four.
Q. Was it 4 or 5?
A. Four; four when I went to it.
Q. How many had there been before you went, do you know?
A. Had been 5; Mr. Etzcorn cut one off.
Q. When did you first see that engine that morning?

264 A. That done the work?
Q. Yes; at work.
A. About 10 minutes before I went over.
Q. What time had you gone to work the night before?
A. At six o'clock. Perhaps you don't understand why I hadn't seen that engine. I could explain to you.
Q. I think I understand. Now where were you when you first saw that engine and the 5 cars that morning?
A. I was about the length of this building from them when I first saw them.
Q. In which direction?
A. West of me then. They came from the west, going towards the east; came towards me; came from the west towards the east; towards me.
Q. Where, with reference to the depot, did you stand?
265 A. I stood at the east end.
Q. East end of the depot?
A. Yes, sir; east of 5th-street crossing.
Q. You were then east of 5th-street crossing?
A. Yes, sir.
Q. At that time?
A. Yes, sir.
Q. When you first saw them?
A. I was tending switch for the way freight, to let them out.
Q. Which way was the way freight going?
A. Came up the track to get onto another, so she could go down to the west-end turn-table.
Q. Then the freight train was going west?
A. The way-freight train came from the west; they turn around, and that engine goes west again.
Q. In addition to this engine handling the 5 cars you say
266 another engine came into the yard with a train of cars?
A. Yes, sir.
Q. From which direction did that engine come?
A. From the west.
Q. From the west?
A. Yes, sir.
Q. How far east did it go?
A. No further.
Q. Stopped at Niles?
A. Yes, sir; turned round there and went west again.
Q. The engine or the train?
A. The engine.
Q. Turned round and went west?
A. Yes, sir.
Q. Now, with reference to the time you were injured, how long was it before that that this freight engine went west?
A. How long before it went west?
Q. Yes.
A. It had gone the night before.

267 Q. I say before you were injured and after it came in that morning.

A. Not more than 5 minutes.

Q. Then at the time you were injured that freight train had got out of the way, had it?

A. The engine had got out of the way; got down on the turntable.

Q. West?

A. Yes, sir.

Q. Now, will you state over again the conversation you had with Mr. Bachelor on the morning of May 7th?

A. On the evening of May 7th.

Q. Well, evening of May 7th.

A. The conversation was this: He told me that he wanted me to help the boys switch in the morning; said, John goes down to the west end. That leaves John Etzcorn alone. I have got to have you help him, he said.

268 Q. Help him switch?

A. Help him switch and couple; make up these trains for South Bend. He said, These trains have been late several mornings now. I says, All right, if you want me to do it; you told me I should not do it. He says, I must have you do it. At that I went on and done the work after that.

Q. That was the last conversation he had with you with reference to doing work?

A. Yes, sir.

Q. That was all of it?

A. That was all of it. I done my work and done it satisfactorily; he had no fault to find.

Q. Now, at this crossing on 5th street there was a switch just east of it, was there not?

A. Yes, sir.

269 Q. Was that one of the switches you attended to?

A. Yes, sir.

Q. How long had you been tending that switch?

A. I tended it more or less from the time I went to work nights.

Q. How far east of the east end of the plank on that crossing was the switch arm or handle?

A. I should judge about 10 or 12 feet.

Q. 10 or 12 feet?

A. I should judge that distance.

Q. How many times during the night would you handle that switch?

A. Some nights would not have to handle that one at all.

Q. Then again you would handle it frequently?

A. Then again every 5 or 10 minutes.

270 Q. Had you been handling it that morning?

A. No, sir; not that one.

Q. Had you been handling it the morning prior to that?

A. Not as I remember.

Q. When was the last time before your injury that you had handled it?

A. On the east end?

Q. Yes.

A. There was 4 switches on the east end; there was three that I handled frequently.

Q. Did you understand my question? I asked you when was the last time you handled that switch that operated the rails at this crossing before you were injured.

A. Do you mean on the east end or west end?

Q. Which end have I been talking about? Do you understand my question?

271 A. The morning I was hurt I was handling this switch on the west end.

COURT: He wants to know how long before you were hurt.

A. That is more than I can tell you. I didn't keep track of it. I might have handled it that night.

Q. It was a switch that was frequently handled?

A. Yes, sir.

Q. Now, sir, what time in the morning do you say it was?

A. It was half past four in the morning.

Q. Wasn't it half past five?

A. No, sir.

Q. You are very positive of that?

A. The sun hadn't got up yet.

Q. Are you sure it was not half past five?

A. No, sir.

272 Q. Hav-n't you made a report, in reference to that transaction, that it was half past five?

A. No; I don't know as I have. I know what time the trains are due there. The train is due at half past four, I think.

Q. Did you sign a report?

A. No, sir.

Q. Of any kind?

A. No, sir.

Q. Did you make a report of that accident?

A. I made a report and sent to the company afterwards.

Q. You did?

A. Yes, sir.

Q. What do you say as to whether or not you stated in that report that it was 5.30 in the morning?

A. I don't remember whether I did or not; that is more than I can tell you.

Q. What do you say?

273 A. That is more than I can tell you.

Q. If you did so state, was it true or was it not true?

COOLIDGE: I object to that. The witness don't recollect what he said in the report.

(Obj. sustained, & def't excepts.)

Q. You did make a report after the accident, did you?
A. Yes, sir.
Q. Did you make a correct report?

COOLIDGE: I don't think that is proper.
COURT: He can say whether he thinks it is correct or not.

A. I think it was correct at the time it was made.
Q. And the matter was fresher in your mind then than it is now, was it not?
A. Yes, sir; I think it was.
Q. Look at that paper and see whether or not it is the report you made.
274 A. I can't read it.
Q. Is that the paper?
A. That is my paper.
Q. And that is what you made?
A. Yes, sir.

(Paper marked Ex. A.)

Q. Now, what is the condition of the rails that run along at the south and parallel with these plank where you claim you were injured—stationary or movable?
A. They were stationary.
Q. You are very positive of that, are you?
A. The rail at the east end was movable.
Q. It is the rail at the east end I am speaking about.
A. It was movable.
Q. Moved with a switch-bar?
A. Yes, sir.
Q. How were the north and south rail attached together so as to hold them in place?
275 A. There were bars across.
Q. Underneath?
A. Yes, sir.
Q. How were those bars fastened to the rail?
A. They are fastened with a clamp on each side.
Q. And those clutches and bars run up close to the planking?
A. I think the last bar run up about six inches of the plank; might have been a little further; I think it run about that distance.
Q. So that when the switch was thrown south the rail would move away from the plank on the north side, would it not?
A. There was not room enough for a man to get hurt.
Q. Would it move at all?
A. I never paid attention to it whether it moved or not; I never noticed.
276 Q. Could you bend two rails like that with a switch-bar?
A. Yes, sir.
Q. Now, how far east of the east end of the plank was the switch-bar attached to these rails I have been talking about?
A. That moved the switch?
Q. Yes.

A. About 10 feet, I should judge; might have been 10 or 12 feet. I never measured it. I should judge it was that.

Q. What is the throw necessary to make the joint on the next pair of rails with this switch?

A. What is necessary, do you say?

Q. How far would you have to move these rails south to join it onto the next rails—to do the switching?

A. I should judge about three inches.

Q. Then you say the switch-bar was about 10 feet from
277 these plank?

A. 10 or 12 feet.

Q. And moving that end of the rail 3 inches you would not move the rail at the plank at all. Do you mean to be so understood?

A. Yes, sir. I don't think you could.

Q. But that you can bend two bars of iron like that?

A. Yes, sir.

Q. And make that coupling with the switch?

A. Yes, sir.

Q. What tracks was that switch used for?

A. Generally used for what they call the South Bend track; puts the South Bend train on—store cars—in the night.

Q. It was a store track, then?

A. Yes, sir.

Q. Used for storing cars?

A. Yes, sir; loaded cars generally.

278 Q. And used to switch into the freight-house?

A. Occasionally take them out of there and put them into the freight-house when they wanted to.

Q. The South Bend cars were in use every day, were they not?

A. In use every day.

Q. Consequently it required considerable use of that switch to move them backwards and forwards?

A. Yes, sir.

Q. To get them onto the main tracks where they would leave for their respective trips?

A. Yes, sir; but I was not always there. When I had work to do I was not there.

Q. When did your work begin?

A. Six o'clock nights.

Q. When did it end?

A. Seven in the morning.

279 Q. What time was it in the morning that you first saw Etzcorn?

A. I saw Etzcorn during the night very often, as far as that is concerned. I could not tell you how often I saw him; I saw him pretty near every 10 or 15 minutes.

Q. When was the first time you saw him that morning?

A. Just before I was hurt.

Q. How long before?

A. 5 minutes.

Q. Where was he?

A. He was coming up with them cars—coming out of the freight-house with 5 cars and an engine.

Q. That was the first time you saw him?

A. That was the first I saw.

Q. Did you see him throw off the end car?

A. He cut the end car off himself and got up to hold it.

Q. You saw him get on the car?

280 A. Yes, sir.

Q. Who spoke first at that time?

A. I did, to him.

Q. What did you say?

A. I asked him where he wanted those cars.

Q. What did he say?

A. He said one in and one out.

Q. He had already cut one?

A. Yes, sir.

Q. Where did you then go?

A. After I had asked him I set the switch over for the freight-house and went up and motioned the engineer ahead and stepped in to pull the pin; pulled the pin and laid it up on the deadwood. Then I went to lift my right foot after I had the pin pulled and it would not come.

Q. When was the last time before that that you had operated that switch?

281 A. Before that?

Q. Yes, sir.

A. I hadn't been there that night.

Q. You hadn't been there that night before?

A. No.

Q. You had no difficulty in discovering Etzcorn on the car?

A. No, sir.

Q. You knew him?

A. Yes, sir.

Q. Was his back or face towards you when you first saw him?

A. That is more than I can tell you.

Q. How far away was you?

A. About the length of this court-house away from him when they came up and I turned the switch.

Q. What switch did you turn?

A. Turned the switch for that engine to go west.

282 Q. Where were you going to put this car that you claimed to have uncoupled?

A. In the freight-house.

Q. How far east had the engine drawn the west end of the car that you drew the pin from? Which car did you draw the pin from; the car that you switched out or the car that remained attached to the other three cars?

A. Pulled the pin of the car that went into the freight-house.

Q. You pulled that pin?

A. Yes, sir.

Q. How far east of this crossing was the west end of the car from which you took this car?

A. I should judge it was probably about six feet from the crossing west when I stepped in to pull the pin.

Q. Six feet from the end of the crossing?

283 A. Yes, sir.

Q. West?

A. Yes, sir.

Q. It was 6 feet west of the east end of the crossing?

A. Yes, sir.

Q. When you stepped in to pull the pin?

A. When I motioned him ahead.

Q. They had gone no further east on the crossing that morning while you were there?

A. The first car was standing almost on the crossing, just a little bit over, about six feet over, when I went in.

Q. So that you were at no time nearer than six feet to the east end of the crossing?

A. I went back two steps.

Q. How many steps? I mean the planking on the crossing, of course.

A. How many steps did I take?

284 Q. Yes.

A. I never took only one; just set my left foot.

Q. This was within six feet of the east end of the plank west?

A. Yes, sir; I should judge it was that; I don't know; I didn't measure it.

Q. You are satisfied that you could not see where the plank ended and the common dirt began?

A. No, sir; not at that time; I could not pay any attention; I had to watch my fingers and not get them pinched.

Q. Do you know how far the west end of this planking is from the east end of the switch that goes into the freight-house?

A. I could not tell the distance exactly.

Q. Have you ever measured it?

285 A. No, sir.

Q. What is your judgment?

A. I should think about 4 rods; between 3 and 4 rods from the west end of the plank to the switch.

Q. Consequently, if you were to switch this car that you say you cut off into the freight-house, it was not necessary to go very far east to go east of the crossing to throw the car back?

A. It was in case you was going to throw the cars——

Q. I mean a single car.

A. We had two to cut off.

Q. One had been cut off?

A. I had two to cut off; this was the first one I cut off; then I was to cut another one.

Q. At the time you cut this you were six feet from the east end of the plank?

A. Yes, sir.

Q. How light was it?

286 A. Just so you could see pretty good.

Q. You could have seen any defect in the plank had you looked, could you not?

A. If I had known there was one there I could have seen it.

Q. Had you looked without knowing could you have seen it?

Ques. obj. to. Obj. overruled.

Q. Give me an answer, Mr. Gardener. Could you have seen a broken plank, or, in other words, would it be necessary for you to know that there was a hole in the plank before you saw it before you would be able to see it by looking at it?

COOLIDGE: I object to that.

COURT: I think the first question was the better one.

287 A. I could have seen it if I had known it was there, but I didn't know it.

Q. If you had looked could you have seen it?

A. If I didn't have any fingers to watch I could have seen it, but I was inside of the track; my right foot was on the outside of the track.

Q. Your right foot outside?

A. Yes, sir.

Q. How far beyond the west end of this plank did the west end of the car that you cut off extend? Do you know?

A. I don't know; the cars were different lengths.

Q. Do you know what kind of a car it was you cut off?

A. No; I don't remember.

Q. Do you know what kind of a car it was that you took it from?

A. Yes, sir.

Q. What was that?

288 A. That was a Mich. Central.

Q. Old Mich. Central?

A. Yes, sir.

Q. Do you remember the number of it?

A. No, sir; I know by the brake; it hung down low.

Q. Do you know about what time the sun rose on the 16th of May?

A. I could tell you if I had an almanac. Of course, I could not recollect now.

Q. Do you know as a fact that it gets quite light before the sun is up?

A. It does every morning, as far as that is concerned.

Q. Do you know how long before you can see the sun it is light enough to distinguish objects within a radius, say, of 15 or 20 feet?

A. Yes, sir.

Q. About how long?

A. Before sun-up?

289 Q. Yes; how long before you can see the sun; how long is the morning twilight?

A. Maybe half an hour. I don't know. Some mornings it is light; sometimes it is dark, as far as that is concerned.

Q. Now, sir, which way were you facing when you uncoupled this car?

A. Facing west.

Q. What hand did you operate the pin with?

A. The left hand.

Q. Where did you put the pin?

A. On the deadwood.

Q. On which car?

A. Car that went into the freight-house.

Q. Then, did you start to walk in the same direction you were facing?

A. Yes, sir.

290 Q. And the cars began to move right back of you in the same direction?

A. Yes, sir.

Q. Isn't it a fact that when you were walking in that position the brake-beam of the car im-ediately back of you and from which you had cut this car off from caught you and carried you down?

A. No, sir; after I was caught the car struck me on the shoulders first.

Q. The car struck you on the shoulders first?

A. Yes, sir.

Q. In striking you on the shoulders did it throw you forward?

A. Yes, sir.

Q. How much?

291 A. Throwed me the whole length of me. I was fast so I could not get any further.

Q. How far were you shoved?

A. 16 feet.

Q. How do you know?

A. Well, I know just the length of the plank. I was in the center of the crossing when I sat up.

Q. Who first spoke to you?

A. Mr. Etzcorn.

Q. He was the first man there?

A. Yes, sir.

Q. Do you know who the engineer was on that engine?

A. I have forgotten his name; some of the parties know his name. I have forgotten it.

Q. Do you remember of having a conversation with Mr. De Rosier after you were injured?

A. Having seen him?

Q. Yes.

292 A. I saw him some time after I was injured. I don't know how soon.

Q. How long?

A. After I was injured?

Q. Yes, sir.

A. I could not tell you. I don't know how long it was.

Q. Did you have any conversation with him?
A. I talked with him.
Q. In reference to this matter?
A. Not as I know of; not a word, I guess.
Q. You didn't have any talk with him about this matter?
A. No.
Q. Didn't you have a talk with him as to how you were injured at that time and place?
A. I guess I told him how I was injured. I don't know as I did.
Q. Then you did have a talk with him about this matter, did you?
293 A. He might have asked me. It has been so long I have forgotten. There was so many came in and asked me after I came to my senses.
Q. What do you say as to whether you did have a conversation with him as to how you were injured?
A. That is more than I can tell you. There was so many talked with me. It has been so long.
Q. Do you remember having a conversation with him about the 19th of May, 1882?
A. I could not tell you what day it was. I know he was there.
Q. At that time?
A. Whether it was that day or not I could not tell you.
294 Q. At this time at your house on the 19th of May, '82, did you say to him this, or this in substance, that you could not tell how you were caught or injured?
A. No, sir; I didn't tell him any such thing.
Q. But you thought you would help the boys out that morning, and in doing that you got hurt?
A. No, sir; I didn't tell him any such thing.
Q. You didn't?
A. No, sir; didn't say anything about I thought I would help them out.
Q. Or that in substance?
A. No, sir.
Q. Did you have any talk whatever about your injury and the way you received it?
A. Not as I know of; I don't think I did.
Q. You say you didn't?
A. I don't know as I did.
295 Q. Now, sir, if this defect that you claim existed there did exist you could have seen it at any time, could you not, if you had looked?
A. I never seen it.
Q. I say you could have seen it at any time had you looked at that point?
A. When a man is doing his work with his fingers?
Q. No; answer the question, yes or no.
COURT: Suppose you had gone there and looked?
A. Yes; I could have seen it if I had gone on purpose to look.

Q. If you had not gone on purpose, if you had looked where it was, do you think you would have seen it?

A. If I gone on purpose to look at it?

Q. No; if you hadn't gone on purpose to look at it?

COURT: If you had been there without going on purpose
296 to look at it could you have seen it?

Ques. obj. to. Obj. overruled.

COOLIDGE: The witness don't understand the question.

COURT: With my explanation he can understand it; if he was there without going purposely to look for it could he have seen it?

A. If I had been there without going there on purpose I could have seen it.

Q. Would it have been necessary for you to have turned your attention directly to what you claim was the defect before you would have been able to have seen it under any circumstances?

COOLIDGE: There is a good many big words there; I don't know whether the witness can get it through his head or not.

COURT: I think that "under any circumstances" had better be stricken off.

297 STEWART: Strike that off.

COOLIDGE: We will take an exception.

Q. What is your answer? What do you say, Mr. Gardener?

A. I have forgotten what it is.

(Ques. read.)

COURT: If you had been passing along there without your attention having been called to it.

A. I could go by it 100 times and not see it and not pay no attention to it.

Q. Was it of such a nature that you could not see it unless your attention was called directly to it?

A. Yes, sir; it was of such a nature if my attention was not called to it I could not have seen it.

Q. Do you know when the planking on that crossing was laid?

A. Yes, sir.

Q. When?

A. I don't know when it was laid.

Q. I thought you said you did?

298 A. No.

Q. You didn't?

A. I don't know when it was laid. It had been there ever since I had been in the yard—been planks there.

Q. Taken up and relaid, hav-n't they?

A. Yes, sir.

Q. Now, sir, was there any defect about that planking from the time it was originally put there until you was injured, that you know of?

A. The plank must have been defective when it was put there.

COURT: He asks you if you knew anything about any defect in it.

A. No, sir; I never had any chance to know anything about it.
Q. As far as you discovered, was there any defect in that plank?
299 A. No, sir; not as far as I discovered.
Q. It was a good and proper crossing for the purpose and place, was it not?
A. As far as I knew.
Q. You saw no defect in it?
A. No, sir.
Q. When it was originally put there?
A. No, sir.
Q. Had you ever called the company's attention or the attention of any officer of the company to any defect?
A. Not of that kind.
Q. Had you of any kind?
A. The switchers I had.
Q. I mean in reference to the planking?
A. No, sir.
Q. Who do you understand was the proper person to notify of defects?
A. The plank——

COOLIDGE: Wait a minute, he don't know of any defect.
COURT: He said he didn't notify anybody and didn't know
300 of any defect.

Q. Do you know what labor generally was worth per month outside of railroads at the time you were injured?
A. Labor was going at different rates.
Q. Do you know what it was worth, ordinary help?
COOLIDGE: What kind of work do you mean?
Q. Say, for instance, draying.
A. You mean railroad labor?
Q. I mean common labor around the streets.
A. I was not in town. I didn't make any inquiries whatever.
COURT: He does not know that.
A. I done my work——
COURT: You have answered the question; not to- much talk.

Q. That crossing was a highway crossing?
A. Yes, sir.
301 Q. It was properly kept and cared for, was it not?
A. I always thought it was, as far as I knew.

Redirect by Judge COOLIDGE:

Q. Mr. Gardener, we understood you to say that when you attempted to uncouple the car that you were some feet east of where your foot became fastened.
A. Yes, sir.
Q. About how far?
A. About six feet; might have been 8.

Q. Were the cars in motion?

A. Yes, sir.

Q. Will you now state and show the jury more definitely what you did?

STEWART: Now, just wait a minute. I don't know as I apprehend what is about to take place. I object to it upon the ground that there has been some kind of a construction brought in here.

302 What it is I don't know. It has been placed before the jury, and it has been there since this trial has been going on. Now I should apprehend, from the nature of this question, that there is some explanation to be given, and so far there is nothing in the case that makes what they have brought in here an exhibit or shown to be in any way connected with this case. I ask to have it removed from the room and from the presence of the jury. What it is or what it represents I don't know.

COURT: He went on and stated that this represented the north rail of the south track, and this wood, as I understood, was to represent the plank and that was to represent that there was a hole there.

COOLIDGE: I asked him if that was the same kind of a rail.

COURT: I don't think walking across there to show how it was done can be done.

303 STEWART: If you don't propose to do that I ask that it be removed.

COOLIDGE: It is not an exhibit; it is merely a representation.

STEWART: I want it out of court if it is not an exhibit.

COURT: There has been testimony offered without any objection as to the position of the rails and the boards; there has been no objection made to it. Now to strike it out—if that is done the whole testimony has to be taken out, which I don't think should be done. As far as walking over it to show how the thing transpired I don't think would be a proper representation because it does not lay in the position the track would lay.

STEWART: Do I understand the ruling to be that this piece of wood and iron may remain here?

304 COURT: I don't see any objection to its remaining there; it has been testified to.

STEWART: I take an exception.

Q. You said at the time you attempted to uncouple the cars the cars were in motion?

A. Yes, sir.

Q. In what direction were they going?

A. Going west.

Q. State whether you moved along as the cars moved.

A. Yes, sir; I moved along as they did.

Q. When you got opposite where you say your foot became fastened, what then?

A. I was ready to step out; as I went to bring my right foot out it was fast.

Q. What did you do then?

A. I set my left foot back on top of the rail; thought I could lift my right foot and pull it back.

305 STEWART: I object; he is using that thing to explain what he did. I certainly have a right to have it in or out of this case.

COURT: You may call it in the case.

STEWART: Call it in the case?

COURT: Yes, sir.

STEWART: Then I will make the objection that the court rules it in of his own motion and take an exception to it.

COURT: You can offer it as an exhibit yourself if you wish to.

Q. What did you do when your foot became fast?

A. When I found I was fast I looked back in this shape to see where my foot was; didn't know what held it. I saw where it was and I took my left foot and set it on top of the rail, thinking I could have time enough to pull my right foot back and get it out, and

306 get it out of the way, but I didn't have time, the cars took me in the back; about the time I was bending over the brake caught me through here and pushed me down.

Q. Was this rail on the north side?

A. On the north side of the south track.

Q. Was that a movable rail?

A. It was a movable rail at one end.

Q. Which end?

A. East end.

Q. Had that switch been used that morning?

A. Not that morning. I hadn't used it.

Q. If you should operate the switch on the east end, what effect would it have upon the west end of the rail, on the west 2 or 3 feet of the rail?

A. It would have had the effect of moving it if it was fastened here.

Q. How long was that rail?

307 A. I should judge 10 or 12 feet long; not longer; I don't think it is.

Q. When your foot became fastened, how far was that from the west end of the rail?

A. Well, I don't know. I don't know where the joint was at the west end; I could not tell; it might have been right by it; it might have been six inches away from it.

Q. If the switch had been 10 feet from where your foot became fast, how much would it have moved the rail at that spot?

A. At that point?

Q. Yes, sir.

A. I don't know as you could tell the difference. I don't know that you could discover that it moved it any.

308 Q. Will you state to the jury where your foot became fast, whether something broke down or whether your foot went under the plank?

A. As I understood it, as I saw it my foot was under it. I could

not see no heel at all. I got up, and then I saw a splinter lying over east of me where this foot had come up and pulled that little piece off.

Q. Will you state to the jury whether after the accident you suffered pain?

A. Yes, sir.

STEWART: I object as irrelevant and immaterial.

(Obj. overruled, & def't excepts.)

Q. You may state whether the pain was light or excessive.

A. The pain was great at the time. During the time it was healing up it was not as bad as it has been since.

309 Q. State whether you suffer pain now——

STEWART: I object to that as irrelevant and immaterial.

Q. From the accident.

STEWART: Same objection.

(Obj. overruled, & def't excepts.)

Q. You may state.

A. Since it has healed up I suffer more pain than I did during the time it was healing up, especially yesterday. Yesterday the pain was worse than it has been for some six months. What was the cause of it I don't know. I could hardly rest all the afternoon or all night.

Recross by Mr. STEWART:

Q. I understand you now to say that you were about six feet east of this planking?

A. Yes, sir.

310 Q. And when you went to uncouple the cars they had already started and were in motion?

A. Already started ahead as I motioned him ahead.

Q. They were in motion when you started to go in to uncouple?

A. Just started.

Q. They were in motion when you started to go in to uncouple?

A. Yes, sir.

Q. How long had they been moving?

A. Just started.

Q. You walked along then until you came to this plank and stepped upon the plank, did you?

A. I didn't step up.

Q. What did you do?

A. My foot must have went under it.

Q. It must—what did it do?

A. It did. It went right under it; right in that hole in the plank.

Q. Is there any step down from the plank to the ground?

311 A. There is next to the rail the thickness of the plank.

Q. The thickness of the plank between that and the ground?

A. Yes, sir.

Q. Had you stepped up onto the plank at all?

A. No, sir; I hadn't stepped up onto it.

Q. How is that?

A. My foot went under it.

Q. How do you know?

A. Because I could not see my foot.

Q. You could not see your foot?

A. No, sir; my foot was in up to there—up to the instep.

Q. What do you say you did then?

A. I took my left foot and set it back on top of the rail, thinking I could pull my right foot out, but I was unable to do it.

312 Q. Now, what did you mean when you swore before dinner that you was not nearer than within six feet to the east end of this plank?

A. What did I mean?

Q. Yes.

A. I mean I was within six feet of the crossing when I stepped in to uncouple the car.

Q. What did you mean when you said you was not nearer to the east end of this planking than six feet when you undertook to uncouple the car?

A. I undertook to pull the pin.

Q. What did you mean by that?

A. I meant I stepped in to pull the pin and get that car off.

Q. When you undertook to do that you was six foot west of the east end of this planking?

A. Six feet west.

313 Q. What did you mean when you swore before dinner that you was six feet west of the east end of this plank?

A. You made a mistake; that is wrong.

Q. Who called your attention to that mistake?

A. I didn't say west end; I said east end.

Q. Who called your attention to that mistake?

A. I don't know as I made any.

Q. If you stated in your direct examination before dinner that you was six foot west of the east end of this plank, was that true?

A. I didn't say so.

Q. I say if you did say so?

A. I say the east end.

Q. Will you answer my question?

A. I didn't say so.

COURT: He says he didn't say so. You can ask him if he did say so.

314 A. Will you just allow me——

Q. With whom have you talked about this part of the case since you went off from the stand?

A. Nobody.
Q. You have not said a word to anybody?
A. Not about the case.
Q. Hav'n't you had a talk with your counsel about that part of your testimony?
A. No, sir.
Q. Hav'n't you had a talk with your counsel with reference to where you stood when you started to uncouple these cars?
A. I told them that more than 100 times.
Q. Hav'n't you since you went off the stand talked this over?
A. No, sir; I don't know as I talked any such thing.
Q. Who is there that knows better than you?
315 A. Nobody.
Q. Do you mean to say that you have not talked with your counsel about that part of the case—as to where you started to uncouple the cars?
A. I told you the distance I thought I was from the end of the plank when I stepped in when the train was in motion.
Q. They called your attention to what you had testified to, didn't they?
A. No, sir; they didn't.
Q. You swear positive to that, do you?
A. Yes, sir.
Q. How fast was this train backing up?
A. Going ahead. She was not backing.
Q. Which direction was it going in?
A. Going west the cars ahead of it.
Q. It was pushing?
316 A. Pushing the cars; the engine was going ahead; that was not backing up.
Q. The engine was going west?
A. Yes, sir; and the cars was ahead of it.
Q. Is there any injury to your right foot?
A. Not now; there was at the time; it hurt me some time; I suppose it strained it a little.
Q. Who did you show that to?
A. I don't know as I showed it to anybody.
Q. Did you ever tell anybody about it?
A. I have thought sometimes it hurt me a little; that is all; there is no bruises or breaks.
Q. Now, sir, if your foot was caught in the condition you say it was, why didn't you throw yourself right over north?
317 A. I did try to as much as I could; you have both feet fast you cannot throw yourself.
Q. You say you only had one foot fast?
A. I had one foot fast and the wheel caught my left foot and turned it bottom side up.
Q. The wheel did?
A. Yes, sir.
Q. Was that the first part of you that was caught?

A. The brake caught me here, turned me in that shape; turned my foot bottom side up.

Q. That was the first place you was struck?

A. The first place was in the shoulders.

Q. Where was your left foot then?

A. In the rail. The car extends over the wheel, doesn't it?

STEWART: I understand you offer this as an exhibit.

318 COOLIDGE: We say nothing; it is not necessary that we should.

STEWART: I would like to know of the court whether it is in the case or out of it. I ask to have it removed.

COURT: The sheriff will take it away.

STEWART: I ask that all the testimony given as illustrated by that implement be stricken from the case.

COOLIDGE: To that we object.

COURT: A thing may be introduced for one thing and not for another. It was introduced here for the purpose of showing the position of the rails in relation to the cars. That is done with. If they don't propose to use it any further, set it away, that is all.

319 STEWART: If it has been used for that purpose, it is a matter that could be cross-examined upon.

COURT: You can cross-examine if you wish to. You can have it brought back and cross-examine.

—. Was there any planks between the two rails?

A. Yes, sir; that is all planked over.

Q. Was that plank as high as the plank on the outside?

A. They was all one thickness.

STEWART: The planking was such as is usually used in such places?

A. I never put any down. I suppose they was all alike. I never worked at that business, putting them down.

Q. Do you say that this exhibit that has been taken out represented the hole your foot got into?

320 A. It is as near as I could make it.

Q. You made that, did you?

A. Yes, sir.

Q. That is precisely as it was?

A. As near as I could make it; might have been a little longer or a little bigger. I don't think the hole on top was quite as long.

Q. You made it the best you could with reference to how the other hole was?

A. Yes, sir.

Q. Who assisted you?

A. I laid the plan-s; I nailed the boards together myself and sawed them off.

Q. Who assisted you in it?

A. Nobody assisted me, only my brother-in-law got the nails for me.

Q. You made it from your recollection?

A. Yes, sir.

Q. And the only time you ever saw it was when your foot
321 was fastened in it, was it?
A. The only time I ever saw it was after I pulled my foot out; after they pulled me out.
Q. You didn't go back there to look at it?
A. Not afterwards; they took me away; I have been there a number of times since.
Q. The only view you got of it was while you looked at it with your foot fast in it?
A. After they pulled me out.
Q. After they pulled you out?
A. I had my senses after they pulled me out, so I could see it.
Q. You were quite a ways west of it?
A. 16 feet; that is not a great ways.
Q. Sitting up?
A. Yes, sir.
321*a* Q. That, together with the time you looked at it, is the only time you ever saw it?
A. That is all; the only time I ever saw it.

321*b* Witness recalled.

Direct examination by Mr. COOLIDGE:

Q. Do you know this witness, De Rosier?
A. Yes, sir.
Q. Was he at your house after the injury?

STEWART: I object; it has been gone into.

(Obj. overruled, and def't excepts.)

Q. When was he there?
322 A. In the morning.
Q. I mean how long after the injury?
A. On the 19th.
Q. You may state in what condition you were then.
A. I was very feeble at the time he came to see me.
Q. Now you may state the conversation.

STEWART: I object to it as having already been gone into.

(Obj. overruled. & def't excepts.)

A. He says to me, Mr. Gardener, I came to pay you a friendly visit. I didn't come here with any expectation to make any arrangement for the company for anything. Says he, How did you come there in that place? I told him I was ordered by Mr. Bachelor to help the boys when I had no work. I told him I had no work that morning of my own.
Q. Anything else said?
323 A. Then he asked where the boot was. In the first place he asked me how I came to be caught. I told him I got caught in a hole on the east end of the north rail. He says to me, That is bad. I says, "Yes;" it was very bad. Then he wanted to

know if he could see the boot. My folks went and got the boot off from the left foot and showed it to him. He placed it on the floor and called my attention to it, and he says, Mr. Gardener, is that the way your foot was when it was caught? Did it turn your foot bottom side up? I said, Yes; it turned it bottom side up, and the wheel run on it. How was it the wheel run on it, he says.
324 I says, My right foot was fast, and as I set my left foot down it pushed me over, and the wheel caught my foot and turned it bottom side up. I told him they shoved me some 16 feet.

Q. Did you tell him what position you were in when you fell?

A. I told him I cut a car off and was in the act of getting out; that I pulled the pin and laid it on the deadwood and was in the act of getting out—stepping outside the track again—when I went to lift my right foot to step out I could not get it out. I looked to see how my foot was fast and at that I was pushed down.

Q. Just tell how you were pushed down.

325 A. The cars struck me in the back.

Q. Did you tell him that?

A. I told him just how it was done. I told him that the car struck me in the back and pushed me down and shoved me 16 feet. That is all I remember of telling him. My conversation was very short with him. I was very feeble at that time.

Q. Did you tell him how you were dragged?

A. I told him I was dragged.

Q. State what you said about that.

A. I told him I was dragged on the plank 16 feet from the end, and furthermore I told him it never broke my bone here until they pulled the car back off from me; told him also that they
326 mashed my foot then; the brake caught me in this shape and tore my clothes and flesh; they shoved me, then, right along.

Q. What was the condition of the boot that he saw?

A. The top was torn off and the sole on one side.

Q. Who were present then?

A. My wife and sister-in-law, two sisters-in-law, were present at the time. They went and got the boot for him. The right boot had a few marks on it as if it had been struck with a stick of wood or something, but he didn't see the right boot; they didn't show that to him.

Q. You heard Mr. Bachelor's testimony this morning?

A. Yes, sir.

327 Q. When was it he told you not to couple and uncouple cars?

STEWART: I object to that; they went into that.

COOLIDGE: We propose to show that he did tell him not to do it and subsequently told him to do it.

(Obj. overruled, & def't excepts.)

Q. When was it that you were hurt before?

A. It was in February.

COURT: Of what year?
A. In '82.
Q. Have you been up to the depot this morning or last night?
A. I was there this morning.
Q. Did you go to the 5th-street crossing?
A. Yes, sir.
Q. Who was with you?
A. Mr. Shockley.
Q. You may state whether you made any measurement as to the effect of the switch there at the east end.
A. I did.
328 Q. Just describe what you did.
A. I went up there this morning and pulled that switch to see.
Q. What switch?
A. The switch on the east crossing. The switch stands on the south side of the rail. I pulled from the south track onto the coach track. You could hardly discover the movement against the plank. I pulled it over on what we call the repair track. You could not get only about a quarter of an inch between the rail and the plank.

Cross by Mr. STEWART:

Q. Who was there with you this morning?
A. My brother-in-law.
Q. Who else?
A. Nobody else. Us two was alone.
329 Q. You have stated what you claim took place between you and Mr. De Rosier at your house at the time he was there?
A. Yes, sir.

330 And on said trial, Oct. 16, 1888, said plaintiff read in evidence the deposition of John Lino, a copy of which is as follows:

331 Deposition of John Lino, of the city of Niles, in the county of Berrien, in the western district of the State of Michigan, a witness produced, sworn, and examined on the twenty-eighth (28th) day of September, A. D. 1887, at the office of Charles T. Larimore, a notary public in and for said county, in said State of Michigan, pursuant to a notice, a copy of which, with an affidavit of service thereof, is hereto annexed, said deposition being on the behalf of the plaintiff in a cause depending in the circuit court of the United States for the sixth circuit and western district of Michigan, southern division, between Frederick Gardner, plaintiff, and The Michigan Central Railroad Company, defendant, and I, having administered an oath to said witness that the answers given by him should be the truth, the whole truth, and nothing but the truth, *I* proceed to the examination as follows:

JOHN LINO, of the city of Niles, county of Berrien, and State of Michigan, aged more than twenty-one years, a witness produced, sworn, and examined on the part of the plaintiff, deposeth as follows, to wit:

JOHN LINO, a witness produced on the part of the plaintiff, being first duly sworn, deposes and says:

Counsel for defendant objects to testimony of said witness being taken for the following reasons: First, the rules and practice for taking said testimony *de bene esse* have not been complied with on the part of the plaintiff; second, the notice is short in time;
332 third, it is irregular and unlawful, as is shown on the face of the notice.

Col. E. BACON:

Q. State your name, age, residence, and occupation.

A. John Lino; age, thirty-six years the fifth of last November; occupation, is brakeman on the Cincinnati, Wabash and Michigan railroad; my residence, Niles, Michigan; have resided here twenty-eight years.

Q. Were you in the employ of the Michigan Central Railroad Company?

A. Yes, sir.

Q. For about how long?

A. Fifteen years.

Q. In what capacities?

A. I first commenced working on the track as a laborer; then I wiped engines for six months; then I went into the yard and piled wood; then I went night-watching; then I went to switch in the yard daytimes; I was helper switch with the engine for four or five months; from that time I got charge of the engines, and from that I got charge of the yard, yard master.

Q. How did you *cease* to be discharged by them?

Objection: Irrelevant and immaterial.

A. I got discharged.

Q. How long ago about?

Objection same as above.

A. It was the last day of December, 1885.

Q. Did you know Frederick Gardner, the plaintiff?

A. Yes; I knew him all the time he was working for the company.

Q. Do you remember Frederick Gardner getting hurt in
333 the Niles yard of the Michigan Central Railroad Company?

A. Yes, sir.

Q. How long ago was that?

A. To my recollection, it was the spring of 1882.

Q. In what capacity was you then employed by the Michigan Central Railroad Company?

Objection: Irrelevant, immaterial.

A. Assistant yard master in the daytime at Niles.
Q. Did you see the hole where Gardner was hurt?

Objection: Irrelevant, immaterial, calls for a conclusion of witness and assumes a fact not shown.

A. Yes, sir.
Q. What time did you go on duty in the morning in May, 1882?
A. Seven o'clock.
Q. State whether in that month when you came on duty one morning anything unusual called your attention to the Fifth-street crossing.

Objection: Irrelevant, incompetent, and vague and indefinite.

A. Yes, sir; it was John Excom that told me that Fred. Gardner had his leg cut off on that crossing that morning.

Objection to answer as hearsay and not responsive to question.

Q. Did you then go to the crossing?
A. Yes, sir.
Q. State whether an unusual number of people were collected there.

Objection: Irrelevant and immaterial.

334 A. Yes, sir.
Q. Name all the persons you remember seeing there at the crossing at that time.

Objection same as last above.

A. I saw Dr. B. Cook there for one that I remember; Clem. Shodsley, he was up there, too; I saw him; a great many others, too. I don't remember their names now.
Q. What appearance did the crossing present?
A. Well, there was blood along on the planks and marks where something had been dragged along.
Q. Which track was this on?
A. We called it the south track.
Q. Which rail of the south track was the blood beside?
A. The north rail.
Q. Did you see a hole there?
A. Yes, sir.
Q. What was it in?
A. In one of the crossing plank nearest the rail. It was at the east end of the plank.
Q. How wide was the hole? Describe the hole.
A. It was about four inches wide on the east end; between a foot and eighteen inches long.
Q. What shape did the hole take as it went west?
A. It tapered and became narrower.
Q. State how the planking lay as to the top of the rail.
A. It was about level with the top of the rail.
Q. How deep did the hole extend?

A. Just the depth of the rail.
Q. What was under that hole?
A. Nothing but earth.
Q. What did you see near this hole?
A. There was blood right there by the hole.
335 Q. Were there any marks near the hole? If so, describe them.
A. Yes, sir; marks as though something had been dragging along there.
Q. What, if anything, was the common talk of the people there at that time as to what had happened that drew them together?

Objection: Irrelevant, immaterial, hearsay, and incompetent.

A. On account of Fred. Gardner getting hurt that morning.
Q. Which way from the hole were the marks extended?
A. West.
Q. Do you know how that hole was made there?
A. Yes.
Q. Who made it?
A. I run a car off there and broke it.
Q. Broke what?
A. Broke a piece of plank off of the crossing.
Q. What kind of a car was it?

Objection: Irrelevant and immaterial.

A. A loaded freight car.
Q. How did it happen?

Objection: Irrelevant and immaterial.

A. The switch was wrong and it run off.
Q. Which way was the car going?
A. West.
Q. Is there a down grade there either way?

336 Objection: Irrelevant and immaterial.

A. Yes, sir.
Q. Which way does it go?
A. West; it descends west.
Q. About how long before this morning in May, 1882, when you found these people and the blood by the hole at Fifth — crossing was it that you made this hold in this plank?

Objection: Misleading, irrelevant, and immaterial and assuming and states a fact in the question not shown nor proven.

A. It was berween a month and two months.
Q. In what month that year, as nearly as you can recollect, did you make this hole?
A. As near as I can recollect, it was in the month of March.
Q. On the morning that you first heard of Fred. Gardner being hurt at this crossing did you examine any cars?

Objection: Irrelevant and immaterial.

A. I went down to look at the car that they told me ran over Gardner. There was a bolt sticking through the brake-beam at the west end of the car, and the bolt stuck out about an inch and a half or two inches further than the nut. I saw blood on there and pieces of flesh on the bolt.

Q. Whose car was that, if you know?

Objection: Irrelevant, immaterial.

A. Michigan Central.

Q. Was it old or new?

A. An old-fashioned car; an old one.

Q. How low did the brake-beam hang?

337 Objection: Irrelevant, immaterial.

A. Three or four inches from the rail. It was not over four, if it was that.

Q. Who was with you looking at that car?

Objection same as last above.

A. Mr. Etrycom; Mr. Gragg, too.

Q. What made you think that was the car which hurt Gardner?

Objection: Incompetent.

A. John Etrycom had told me that that was the car which run over Gardner.

Q. State whether on that morning you found the same yard engine which had been there continuously before.

Objection: Irrelevant and immaterial.

A. No, sir; there was a freight engine there that morning.

Q. What had become of the regular yard engine?

Objection: Irrelevant, immaterial.

A. She had gone to Michigan City.

Q. What engineer was in control of the freight engine so found by you on said morning?

Objection: Irrelevant and immaterial.

A. They called him "Pumpkin Waltz." That was all the name I knew for him.

Q. How long had you known him?

Objection: Irrelevant and immaterial.

A. Two or three years. I had seen him around on the road there, working.

338 Q. In what kind of work had he been employed?

Objection same as last above.

A. He was firing an engine on the road the first I knew of him.

Q. About how old a man was he in May, 1882?

Objection: Irrelevant, immaterial.

A. I would not take him to be over twenty-five or six years old.

Counsel for defendant moves to strike the answer out, as it shows that witness does not know anything about his age.

A. How long had he been acting as engineer in May, 1882?

Objection: Irrelevant and immaterial.

A. To the best of my recollection I don't think he had been running a year yet.

Q. Was he an ordinary engineer?

Objection: Incompetent and beyond the knowledge and capacity of the witness to testify, and nothing appears to show the competency of the witness on the subject.

A. I don't understand that question.

Q. What kind of an engineer was he? Tell all you know about him.

Objection: Irrelevant, incompetent. Witness has not been shown to be a competent judge or competent to testify on the sub-
339 ject, and witness has not been shown to have sufficient knowledge of engineering to know what would constitute an ordinary engineer.

A. He was called "an apprentice engineer." He did not have the name of being a good, competent man.

Counsel for defendant moves to strike out answer as being one of hearsay, so far as answer relates to his name.

Q. Did his engine have any air brakes on that morning that you heard that Gardner was hurt?

Objection: Irrelevant and immaterial, and it does not appear that witness knows whether the engine had air brakes or not.

A. No; it did not have any air brakes.

Q. Was this freight engine used by "Waltz" on that morning a fit and proper engine for use as a yard engine at the Niles yard of the Michigan Central Railroad Company?

Objection: Incompetent, calls for the conclusion of the witness. Witness has not been shown to be a proper judge of engines or of locomotive machinery or capable of stating as a fact what would constitute a proper engineer for use in the Niles yard.

A. No, sir; she was not.

Q. Did the regular yard engines have air brakes?

Objection: Irrelevant and immaterial.

A. Yes, sir.

Q. Was it necessary that the yard engine and the engineer
340 managing it at the Niles yard should be very good?

Objection: Calls for conclusion of witness and incompetent.

A. Yes, sir; it did.

Cross-examination by N. H. STEWART, of the firm of Edwards & Stewart, on behalf of defendants:

Q. Why were you discharged by the Michigan Central Railroad Company?

A. Well, that I don't know how I could answer. I never was told by the man I was working for what I was discharged for.

Q. You did not take it kindly, did you, your being discharged?

A. Well, not at the time; no, sir.

Q. You have always *have* had more or less feeling, have you not, about it against the company?

A. Not against the company; no.

Q. Or against some of the officers of the company?

A. I have anything against them? No, sir.

Q. You have not felt as if you ought to have been discharged, have you?

A. No, sir.

Q. You have been in the habit of becoming intoxicated?

A. Since I left; yes.

Q. Before you left?

A. No, sir.

Q. Do you mean to say you never were intoxicated while in the company's employ?

A. I did not mean to say that; no.

Q. How frequently were you intoxicated in the last year you worked for the company?

341 A. I could say I was not intoxicated at all, sir, during the last year I worked for the company.

Q. Do you mean to say that you were not intoxicated at all during the last year you worked for the company?

A. Yes, sir.

Q. Do you mean to say that you did not drink any intoxicating liquor at all during the last year you worked for the company?

A. Yes, sir; I had.

Q. How frequently were you intoxicated during the last two years you worked for the company?

A. I was not intoxicated at all during the last three years I worked for the company.

Q. Were you in the habit of drinking intoxicating liquors?

A. Once in awhile; not very often.

Q. Are you not aware of the fact that you were discharged for drunkenness?

A. I heard that by other parties after I was discharged.

Q. Are you not a man of revengeful disposition?

A. No, sir.

Q. Don't you calculate to settle, so far as you can in your own way, your imaginary grievances?

A. I have got no grievances against the Michigan Central Company.

Counsel for defendant moves to strike answer out as not responsive and repeats question.

A. I do sometimes; yes.

Q. Have you ever resorted to violence with anybody?

342 A. Yes, sir; I did once, twice, three times.

Q. Have you ever been charged with burning buildings?

A. Yes, sir.

Q. You say in your direct examination that you made the hole in the plank?

A. Yes, sir; run the car off there; the car done it.

Q. How long before this accident happened did you do it?

A. It was between a month and two months.

Q. Did you report it to any one?

A. No, sir.

Q. Why did you not report it?

A. Because we did not like to report such things, because there were statements to make out about them and all that sort of thing if we were found out.

Q. Was that the only reason?

A. After the statement was made they would probably lay you off or discharge you, just as they like, for running a car off.

Q. You then knew that the rules of the company required of you and all the employees a report to be made of such transactions?

A. Yes, sir; I knew that.

Q. When the wheel ran on the plank did it do any more than just crush the plank where it was broken down a little?

A. That is all, just crushed it down.

Q. The end of that plank—end of those—were in good condition before that, were they, at that time?

A. Yes, sir; they were.

Q. And that was considered a proper and suitable planking for that crossing, in your judgment?

343 Objection: The question does not state whether it means with the hole or without the hole.

Counsel for defendant objects to counsel for plaintiff attempting to instruct his witness in any such way.

A. Yes, sir.

Q. What became of the piece that was crushed down?

A. That would interfere with the moving of the switch-rails, and it had to be taken up.

Q. Did you take it up?

A. Yes, sir.

Q. Was that north rail a movable rail?

A. Yes, sir.

Q. How frequently did you see this hole after you made it?

A. Two or three times a day; maybe a dozen times.

Q. Was it in anywise covered up so that it was difficult to see?

A. No, a man could see it if he was looking for it, well enough.

Q. Did you consider it a dangerous place after you made it?

A. I did not think anything about it at all.

Q. What do you say as to whether a person working around in that place would be likely to see it or not?

A. I don't know as they could see that particular spot. It was dangerous around by that switch pretty near any place you would a mind to go.

Q. That is true whether that hole was there or not, is it not?

A. Yes; it was a bad place.

Q. Any one by looking at the end plank could see the hole after you made the break, could they not?

A. Yes, sir.

344 Q. Now, how far from the east end of that planking were the first marks that indicated something had been pulled or dragged along on this crossing?

A. About three or four feet.

Q. Was it not over fifteen feet?

A. I don't think it was.

Q. How far west of this appearance of something having been dragged was it that you found blood?

A. To the best of my recollection it was the middle of the crossing the blood was.

Q. You looked carefully for it?

A. Yes, sir; that morning.

Q. Was it west of the center of the crossing before you found any, and have you not so testified before?

A. It was on the crossing I saw the blood. Well, now, I don't think it was west of the center; to the best of my recollection it was near the center.

Q. You were sworn in the case, were you not, when it was tried in the Berrien circuit?

A. Yes, sir.

Q. That trial took place in February, 1884, did it not?

A. Somewhere along that time.

Q. Was your memory any fresher at that time than at present in reference to this subject?

A. I don't think it was; no, sir.

345 Q. Have you talked this matter over recently with any one?

A. Yes, sir.

Q. With the counsel, Mr. Bacon?

A. Yes, sir.

Q. Did he tell you what he wanted you to swear to?

A. No, sir.

Q. Did he show you a book or read you anything out of a book?

A. Yes.

Q. Did he tell you that was substantially what you swore to before?

A. He told me that was my testimony; yes, sir.

Q. How frequently have you been at his office within the last two months in reference to this matter?

A. Twice.

Q. You contemplate moving out of this State?

A. Yes, sir.

Q. Where are you going?

A. I am going to Brainard, Minnesota. I don't know whether I am going to stay there or not.

Q. When are you going?

A. I want to go to-morrow morning.

Q. When are you coming back?

A. I may be back in two weeks and I may not be back at all.

Q. In your former examination in this case, did you not testify that this break was made by you in this plank from fifteen to eighteen days previous to this accident?

A. Not to my recollection, I did not.

Q. Will you swear you did not so testify?

346 A. Not to my recollection; I did not swear to that; I swore to the truth as near as I could, just as I am doing now.

Q. Mr. Line, in the yard, you say, there is a switch. Any one working around there would look out rather carefully, would they not, who knew anything about railroading?

A. I always looked out there. I don't know anything about what any one else done.

Q. You regarded the switch as a worse place than the hole, did you not?

A. Well, I suppose I did, because I was very near caught there once or twice was that made me so careful.

Q. Before the hole was made?

A. Yes, sir.

Redirect by Col. E. BACON, on part of plaintiff:

Q. Was there ever any truth in any accusation against you about burning any building?

A. No, sir.

Q. Did that hole which you have described in the plank interfere with the safety of the crossing for employees of the defendant?

Objection: Incompetent and calls for conclusion of witness.

A. Yes, sir.

2nd cross-examination by N. H. STEWART:

Q. It was such a hole as any employee, had he used his eyesight in that quarter, could have seen, could he not?

A. Yes.

347 2nd redirect examination by Col. BACON:

Q. Would it naturally be seen by a man coupling cars over it, or uncoupling?

A. No, sir.

3d cross-examination by N. H. STEWART:

Q. Suppose he was working around these plank, coupling and uncoupling cars a dozen times a day and working the switch just east of it, would he not then *he* likely to see it?

A. Why, yes; he could see it.

JOHN LINO.

Sworn to and subscribed before me this 28th day of September, A. D. 1887.

CHARLES T. LARIMORE,
Notary Public for Berrien County, Michigan.

Whereupon court was adjourned until to-morrow morning at 10 o'clock.

348 And in the aforesaid Exhibit "A," being the translation of stenographer's notes taken on said trial in the State court, the testimony of said witness, John Lino, in full, is as follows:

JOHN LINO sworn for the plaintiff.

Direct examination:

Q. Where do you live?
A. Niles.
Q. Are you an employee of the Michigan Central R. R. Co.?
A. Yes, sir.
Q. What office do you hold?
A. Yard master now.
Q. You are yard master?
A. Yes, sir.
Q. How long have you been yard master?
A. Two years the 15th of Aug.
Q. Do you know the plaintiff?
A. Yes, sir.
Q. Do you recollect the fact of his getting hurt in May, 1882?
A. I remember the time.
349 Q. Did you see the place where he was hurt or claimed to have been hurt?
A. I saw the place where it was claimed he was hurt.
Q. Where was it?
A. On 5th street, east of the crossing.
Q. East of the crossing?
A. Yes, sir.
Q. On which side of the rails?
A. On the north side of the south track.
Q. Which rail of the track?
A. The north rail.
Q. Which end of the plank?
A. East end.
Q. Will you describe the place you saw there?
A. How do you mean; by this block?
Q. Any way you please.
A. The hole had been cut out by a car wheel; I don't think it was that wide; the car had run up on to the plank and broke
350 a piece out; it don't seem to me it was that wide; it might have been, though.
Q. How long should you judge it was?
A. I should judge it was a foot or 18 inches long.
Q. How wide at the east end?

A. I should think it was about 4 inches wide; might have been wider.

Q. Then tapered off as it went west?

A. Yes, sir; tapered similar to that.

Q. Did you put your foot in it?

A. No, sir.

Q. Do you know whether that hole had been there some time?

A. Well, yes; I could not tell exactly how long. It had been there some time.

Q. It had been there some time?

A. Yes, sir.

Q. Who was the road-bed manager at that time?

351 A. Mr. Dolover had charge of the business, but he had a foreman under him.

Q. Who was his foreman?

A. Henry Serine. He had charge of the crossing switches and track.

Q. Did he have a force of men under him for such work?

A. Yes, sir.

Q. How many men?

A. That I could not say. I don't know exactly how many he had.

Q. Was it their duty to repair such places as this?

A. I don't know. I don't know what orders they had.

Cross by Mr. STEWART:

Q. You were in the employ of the M. C. R. R. Co. on the 16th of May, 1882?

A. Yes, sir.

Q. In what capacity?

A. I was what they call head switchman.

Q. Head switchman?

A. Yes, sir.

352 Q. Had you occasion to go over this place?

A. Had to go over it a great many times a day.

Q. You did?

A. Yes, sir.

Q. Do you know whether or not Mr. Gardener knew that it existed there?

A. I could not say.

Q. Had you ever had any talk with him about it?

A. No, sir; I hadn't.

Q. Did you at any time report this to Mr. Dolover or Mr. Serine?

A. No, sir.

Q. Did you ever make any report of it at all?

A. No, sir; all that was necessary for me was to keep out of it; was all I cared. I didn't think anybody else could get into it. It was a place that was very bad. It was near a switch. A

353 man would naturally look out for the switch and keep out of both places. I thought the switch was worse than the hole.

Q. You saw no difficulty about this hole?

A. I used to go in there to pull pins or couple cars. I used to always look out for myself, or my feet anyway, among them switch-cars.

Q. You didn't try to step your foot into it?

A. No, sir.

Q. You didn't think it possible for a foot to go into the hole you saw there?

A. I didn't want to try it.

Q. Did you ever measure it?

A. No, sir.

Q. To see how wide it was?

A. No, sir.

Q. Or how long it was?

A. No, sir; I merely looked at it. I should judge it was 18 inches long; might not have been that long.

Q. Simply a matter of judgement?

354 A. Yes, sir.

Q. Made no measurement at all?

A. No, sir.

Q. Why didn't you report it if you knew it?

COOLIDGE: Isn't that objectionable?

STEWART: I think not.

COOLIDGE: It seems to me it is. I will withdraw the obj. You mean prior to this?

STEWART: Yes. I will withdraw it if there is any objection to it.

355 JOHN LINO recalled.

Cross by Mr. STEWART:

Q. What time was the M. C. running on?

A. Chicago time.

Q. In May, '82?

A. Chicago time.

Q. Was that slower or faster?

A. Than this time?

Q. Yes.

A. Slower—I don't know, though, now.

Q. At that time, I mean?

356 A. Niles time was 8 minutes faster—between 7 and 8.

Q. When that plank was put there originally there was no break in the end of it, was there?

A. I don't think there was.

Q. It was as such crossings are usally made?

A. Yes, sir.

COOLIDGE: Did you see the plank put in?

A. That I could not say. They put in so many planks. I could not say.

Q. Then you could not tell positively what condition it was in?

A. No, sir; they have to have men putting in planks there and keep repairing up. I could not tell whether I seen that put in or not.

STEWART: You had seen this plank before it was broken, had you not?

A. I think I did.

Q. And that end was square and perfect?

357 A. Yes, sir.

COOLIDGE: How long before, do you think?

A. That I could not tell.

Q. It was some time before?

A. These planks last for a long time square on the end, because nobody drives over them so near the end of the plank.

Q. How long before this accident had you examined particularly to see whether the plank was defective or not?

A. I didn't examine; only just merely saw it was all.

Q. How long do you say it was?

A. I could not give you the date for that. I should think, though, it was easily a month, anyhow. I could not say for that.

Q. The next thing you noticed was that there was a hole there?

358 A. Yes, sir.

STEWART: Did you make that hole?

A. Yes, sir; helped make it.

Q. Then before you made that hole the plank was sound at that end?

A. I think it was.

Q. Did you report it then?

A. No, sir.

COOLIDGE: Did you conceal it?

A. I would get 15 days if I said anything about that.

Q. Didn't nobody know it around there?

A. That I don't know. I never talked with any one about it.

Q. Didn't anybody else but you know it?

A. I think they did.

Q. You think they did?

A. Yes, sir.

STEWART: I ask to have that answer stricken out.

(Motion overruled, & def't excepts.)

Q. State whether Mr. Bachelor knew it.

A. I think he did.

359 Q. How long before the accident was this break made?

A. Well, I should think a month anyhow; it might have been longer; it might not have been so long.

Q. About a month?

A. I think so.

STEWART: What did you mean when you said if you had reported it you would have got 15 days?

COOLIDGE: I object. It has nothing to do with this case.

COURT: Who called out that fact?

STEWART: Mr. Coolidge did.

Q. What did you mean when you said you would get 15 days if you reported it?
A. We got notice that such things would not be overlooked.
Q. What was the penalty?
A. I don't know; according to how well you were liked.
Q. You were laid off 15 days?
360 A. I would have been or probably discharged; either one; just according to how well you are liked.
Q. That was it?
A. Yes, sir.
Q. Then you didn't report this for fear you would be discharged or laid off 15 days?
A. That is it; yes, sir.
Q. Did you ever have any talk with Mr. Bachelor about that?
A. No, sir, I didn't.
Q. Then all you say about his having known it is what you think and guess-work?
A. I think he did.

STEWART: I move to strike out that testimony is hearsay and irrelevant and immaterial.

A. I don't remember having any talk with him about it.

COURT: Unless he had a talk with him or heard somebody else talk with him, it would be mere guess-work.

361 A. It has been so long I have forgotten all about it.

COURT: I think it may be stricken out.

Q. You knew, then, Mr. Lino, at this time that all running off from switches and accidents of that nature was required by the company to be reported?
A. Yes, sir.
Q. To whom?
A. To the yard master.
Q. But you didn't report this?
A. No, sir.
Q. For the reason you have stated?
A. Yes, sir.
Q. Now, do you know why the company required such a report?

COOLIDGE: I object.
COURT: I don't think that is proper. It is sufficient that they required it to be reported, I think.
COOLIDGE: Will you state your reasons for thinking Mr. Bachelor knew it?

362 STEWART: I object.

Q. Any facts?
A. I don't remember having any talk with him upon that subject.
Q. What facts do you know with reference to Mr. Bachelor; what opportunities did he have?
A. He had to cross that way to go to his office at that time.

Q. To go to his office?
A. Yes, sir.
Q. This particular place?
A. He had charge of the car shop and the yard at this time, and his office was in the car shop; that is that building right opposite that switch there.
Q. Do you say, then, that he must have known it?

COURT: That is a matter of opinion.

Q. How often did he go over there a day?
A. Across there?
Q. Yes.
363 A. Oh, he would go from a dozen to 15 times a day across that way over to his office.

STEWART: I move to strike that out, and I object to the question as irrelevant and immaterial and hearsay—simply the opinion of this witness.
COURT: It is a fact as to whether he did go across there or not.
STEWART: If he saw him go.

A. He might not have went across where that hole was in particular, but he went across that way.
Q. Did you see him go across frequently?
A. Yes, sir.
Q. How near to where this hole was?
A. He had to go within 20 feet of it anyhow to get to the shop.
STEWART: Do you know what the duties of Mr. Gardener were at that time?
A. No, sir.
364 Q. Do you know whether he was a switchman tending switch?

COOLIDGE: This is not cross-examination.

A. I know he was hired at the time to tend the east end. What else I don't know.
Q. There is a switch right at this break, isn't there?
A. Yes, sir.
Q. Were not his opportunities as good for knowing of the break as Mr. Bachelor's?
A. That is a switch that is not used much.
Q. I say, presuming that he attended that switch——
A. He had that to tend to.
Q. His opportunities were just as good for knowing of that break in the plank as Mr. Bachelor's?
A. I think so.

COURT: That is a matter for the jury. That is making
365 evidence by comparison, which is not the proper way to get at a fact.

Q. Mr. Gardener did use that switch?
A. Yes, sir.

Q. When he did use it his opportunities were good for knowing and seeing that hole?

A. I don't see why he could not see it. He might not, though; it was only about 15 feet from the end of the switch-rail to that hole.

366 And on said trial, October 16, 1888, the counsel for the plaintiff produced as witnesses Jacob Kemple, Albert Buck, and William Metcalf, which three witnesses had never been called or testified in the suit by the plaintiff against the defendant in the State court; and the testimony of said three witnesses in full is as follows:

367 JACOB KEMPLE, being sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. BACON:

Q. Where do you reside, Mr. Kemple?
A. Niles, Michigan.
Q. What is your occupation?
A. I am a fireman.
Q. For what?
A. Stationary work; paper mill.
Q. At what institution?
A. At the Ohio paper mill.
Q. How long have you been in that employ?
A. Four years and two months.
Q. In what employment were you before that?
A. Railroading.
Q. For what company?
A. The Michigan Central.
Q. What?
A. For the Michigan Central.
Q. At what place?
A. Niles, Michigan.
Q. What kind of employment?
A. I was employed as car inspector and car repairer.
Q. At what station?
A. Niles.
Q. Was that your employment in the spring of 1882?
A. Yes, sir.
Q. Did you know Mr. Frederick Gardner here, the plaintiff?
A. Yes, sir.
Q. At what part of the yard were you employed?
A. All over.
Q. Do you know this 5th-street crossing?
A. Yes, sir.

368 Q. Is there an office or little building a little southeast of the south end of that crossing?

A. Yes, sir.
Q. Whose office was that?
A. It was Mr. Batchelor's office.

Q. How long had it been his office in May, at the time of this accident?

A. I couldn't tell you how long, but it was his office all the while it was there.

Q. It had been for months?

A. Yes.

Q. About how many steps from the south end of this 5th-street crossing was that office?

A. Oh, I should probably think twenty or thirty.

Mr. UHL: Steps?

Mr. BACON: Yes.

Q. You were employed in the daytime?

A. Nights one week, and one week days.

Q. Changed about?

A. Yes.

Q. While you were there were you often near this office? Were you employed near that office?

A. Yes, sir; that was our headquarters.

Q. State whether Mr. Batchelor's business took him across this 5th-street crossing frequently.

A. Yes, sir; I should think it did, quite frequently.

Q. What was his position there?

A. Yard master and foreman of the car department.

Q. Did he stay there nights?

A. No, sir.

Q. Who had his place nights?

369 A. There was nobody in the car department nights.

Q. I mean in the yard department.

A. Mr. Etscorn.

Q. Were you there or present on the 16th day of May, 1882, at the time Frederick Gardner was hurt?

A. Yes, sir.

Q. Did you see a hole in the plank there close to the northward?

A. Not until after he was hurt.

Q. About how many minutes—did you help carry him away at the time he was hurt?

A. Yes, sir.

Q. About what position on the crossing did you find him when you were——

A. (Interrupting.) I found him sitting up.

Q. About what part of the crossing was it?

A. Oh, about the centre of it.

Q. East and west you mean?

A. Yes, sir.

Q. Did you see a hole to the eastward of him a little ways—a hole in the plank?

A. Not when we picked him up.

Q. Did you see it immediately afterwards?

A. I seen it after we got him to the Sykes house and came back.

Q. After you came back?

A. Yes.
Q. About how far was the hole from him to the eastward?
A. Oh, I should think about 15 or 16 feet; in the neighborhood of that.
Q. Describe that hole.
A. The hole at this end (indicating on illustration)——

370 Mr. STEWART: What is that, now?

Q. Describe it any way you are a mind to.

Mr. STEWART: Wait a minute. Let's know whether that thing is in or out.
Mr. BACON: I haven't offered it yet. Mr. Gardner wasn't in a position to examine it.

Q. How does that compare with the hole you saw there?
A. Well, I couldn't exactly tell anything about the comparison of the hole, because I didn't *take* any particular attention to it. When Mr. Shockley came up there, after I got ready and laid my work out at 7 o'clock, I went home, and he asked me whether that was the place Fred. got caught, and I said yes.

Mr. STEWART: Wait a minute. Who is Mr. Shockley?
WITNESS: I had no conversation except that.

Q. State whether you pointed out the same hole to Mr. Shockley.
A. I did, sir.
Q. Describe that hole; about how wide was it to the east end?
A. It was wide enough to get your foot in.
Q. Did you see anybody put his foot in?
A. Yes, sir.
Q. Who?
A. That man Shockley.
Q. About what was the length of that hole?
A. I should think it was 12 or 15 inches long.
Q. Now, state whether it was—the hole was—the same at both ends or whether it tapered towards the west.
A. I think it tapered towards the west.
371 Q. Did you see about how deep a foot could be put down into it?
A. I didn't notice that particularly.
Q. Did his foot go in there?
A. That man put his foot in there; I am aware of that.
Q. Did he have any difficulty in putting it in?
A. No, sir.
Q. It is the same Mr. Shockley that sits here in the court-room, is it?
A. Yes.
Q. Now, sir, did you see that hole before?
A. No, sir.
Q. What?
A. No, sir.

Q. Do you know how that hole was made there?
A. I know how it was made; it was made by a car wheel.
Q. Were you present when it was made?
A. I was present after it was made; I was there and helped to put the car on the track.
Q. You did?
A. Yes, sir.
Q. When the car was moved did it leave this hole?

Mr. UHL: That is objected to as leading.
Mr. BACON: We will waive it then.
The COURT: Avoid leading questions.

Q. Did you help move that car?
A. I helped put it on the track; I didn't help move it any more than to help put it on the track.
Q. Did any part of that car strike the plank?
A. I couldn't tell you whether it did or not; I presume it did or it wouldn't have made the hole.

372 Mr. UHL: I move to strike out what he presumed.
The COURT: Do you consent to its being stricken out? If he don't know of his own knowledge what produced the condition of the plank there to enable to judge from the appearance of the plank what caused it this testimony ought to go out.

(By the COURT:)

Q. Were you able to judge from the appearance of the plank what was the cause of the breakage?
A. No, sir.

The COURT: Then I do not think his testimony is competent, and it may be stricken out—that is, so much as he "supposed that the car wheel jumped off."

Q. Had you noticed that place after the removal of that car until this accident?
A. I hadn't noticed it until the accident.
Q. You didn't?
A. No, sir.
Q. Well, no matter. Did you hear any conversation between Mr. Frederick Gardner and Mr. Batchelor within a few days or — short time before this accident?
A. Yes, sir.
Q. Now, just tell what you heard, as slowly as you can.
A. In regard to this switching?
Q. Yes.
A. Mr. Batchelor, a few days before this accident happened, he called Mr. Gardner to him in my presence and told him that he wanted him to help the boys switch out those cars in the morning—the local cars. Mr. Gardner said, "I don't want to do it." Mr. Batchelor then replied and said, "Well, you will have to do it, because we are short of help and we can't get along without

you do do it. He says, "If you don't I will have to get somebody that will."

373 Q. Now, just tell what you heard, as slowly as you can.

A. In regard to this switching?

Q. Yes.

A. Mr. Batchelor, a few days before this accident happened, he called Mr. Gardner to him in my presence and told him that he wanted him to help the boys switch out those cars in the morning—the local cars. Mr. Gardner said, "I don't want to do it, for you and Mr. Gregg both told me not to do it." Mr. Batchelor then replied and says, "Well, you will have to do it, because we are short of help, and we can't get along without you do do it." He says, "If you don't I will have to get somebody that will."

The above, as changed from original, is correct, it having been omitted when dictated to typewriter operator.

CHAS. H. McGURRIN, *Reporter.*

374 Q. Where was that talk?

A. That was about—well, it was right along there on the 5th-street crossing, between the car shops.

Q. Is this the same Mr. Batchelor who was yard master?

A. Yes.

Q. About what time of the day was that talk?

A. That was shortly after the fast train went east—the "New York express."

Q. In the evening?

A. The evening; yes, sir.

Q. Had you heard any talks between Mr. Batchelor, this yard master, and Mr. Gardner shortly before that?

A. Well, I don't just remember whether I did or not; I think not, though.

Q. When did you first go as an employee in that yard?

A. Well, I cannot just tell you.

Q. About how many years?

A. Oh, I worked there seven years and a half.

Q. State what was the custom as to motion in coupling cars when they were being coupled or uncoupled.

Mr. STEWART: Wait. I ob——

A. (Interrupting.) I can't tell anything about that. I had nothing to do with the switching.

375 The COURT: He has answered Mr. Stewart that he did not know; it is of no importance.

Mr. UHL: Yes, your honor.

Cross-examination by Mr. STEWART:

Q. Mr. Kemple, what did you say your employment was for the Michigan Central?

A. I was employed as car inspector and car-repairer.

Q. When did you leave the employ of the company?

A. Five years ago this April.
Q. How came you to leave?
A. Well, I could do better.
Q. Where have you been since that time?
A. Well, I have been down in Texas part of the time.
Q. Where have you been employed?
A. I was employed in Texas by the Missouri, Kansas & Texas Railroad Company for six months.
Q. What months were those?
A. Well, it was four years ago this winter.
Q. Well, what six months were they, I say?
A. Well, I couldn't tell you just the months exactly; that is about as near as I can come to it.
Q. That is as near as you can get at it, is it?
A. Yes, sir.
Q. When did you first tell this conversation that you say you overheard between——
376 A. (Interrupting.) What is that?
Q. When did you first tell this conversation that you say you overheard between Mr. Batchelor and Mr. Gardner?
A. I don't remember when I did. I told it right after the accident happened.
Q. To whom?
A. I don't remember who.
Q. When did you tell it to Mr. Bacon first?
A. Oh, it was about a month or six weeks ago, I guess.
Q. Who else was present when this conversation took place?
A. I don't remember who was present.
Q. You say you worked around the yard at nights?
A. One week nights and one week daytimes.
Q. When did this conversation take place that you speak of?
A. I told you I don't remember just exactly when.
Q. Well, about when?
A. How is that?
Q. About when, I say.
A. Well, I told you it was probably a month or six weeks ago.
Q. No; I am speaking with reference to the conversation between Mr. Batchelor and Mr. Gardner. When did that conversation take place?
A. A few days before he was hurt.
Q. How many days?
A. I couldn't just tell you.
Q. Where were you?
A. Right on the crossing; between the crossing and the car shops.
Q. What were you doing there?
377 A. I was just going over to the shop from the fast express, after looking that train over.
Q. The fast express?
A. Yes, sir; east.
Q. What time does it come in Niles?

A. I don't know what time it comes in there now.

Q. What time—I am not asking "now." I am asking with reference to the time you are talking about.

A. I don't remember as to the time they came in there; somewheres in the neighborhood between 5 and 7 o'clock in the evening.

Q. That is as near as you can get it?

A. About as near—yes.

Q. You say it was after the fast express train—you mean the limited train out of Chicago?

A. Yes.

Q. It leaves there about 3.15?

A. I couldn't tell you what time they leave there.

Q. Well, it was just after that train passed Niles, was it?

A. Yes, sir.

Q. You started to go across the track southeast; is that correct?

A. Yes, sir.

Q. What was it that attracted your attention in this conversation?

A. Mr. Batchelor attracted my attention by calling for Mr. Gardner.

Q. Did he say how they were short of any help?

A. No, sir.

Q. Did you know of any shortage in help?

A. I didn't.

378 Q. Who else was there at that time?

A. When this conversation came up?

Q. Yes.

A. There was nobody but Mr. Gardner, Mr. Batchelor, and I.

Q. Did you quit the Michigan Central voluntarily, or were you discharged?

A. I quit.

Q. Were you asked to quit?

A. No, sir; not that I know of; I know they never told me they didn't want me.

Q. Who first came to you with reference to this testimony to make a witness of you?

A. Mr. Gardner.

Q. What?

A. Mr. Gardner.

Q. When?

A. Some time last winter—that is, last winter—or last winter I guess it was—late in the fall, between November and December some time.

Q. Had you told this conversation to anybody from the time you claim to have heard it until Mr. Gardner came to see you?

A. I don't remember whether I did or not.

Q. You couldn't say?

A. No, sir.

Q. Now, are you sure that you have told the conversation verbatim, just as it occurred that evening, did you say?

A. As Mr. Batchelor gave it; yes, sir. I am positive that is the way he gave it.

Q. You say you were present when the car ran off of the track by this switch?

A. No; not when the car ran off. I was there and helped put it on after it was off.

379 Q. How long before the accident was that?

A. I couldn't tell you how long. It might have been a month or two months.

Q. Can you give any date?

A. No, sir; I cannot.

Q. Did you notice as to where the wheels were with reference to the rails?

A. Why, they were off of the rails.

Q. Which way; on the north side or on the south side?

A. I can't remember whether it was north or south. I know we done it up pretty quick; we put it on.

Q. What part of the services did you perform?

A. I used the jack under the car.

Q. Which end?

A. The end that was off. Ha, ha, ha! I don't remember. I suppose it was the west end that was off.

Q. You say while you were there you didn't discover this break in the plank.

A. Not then; no.

Q. Well, do you know where the switch is located with reference to that plank?

A. I passed by it, but I never paid any attention to the switch at all.

Q. Do you know how far it is east?

A. I couldn't tell.

Q. After your attention was called to that place on this morning of the accident, would there have been any difficulty or trouble to have seen it by anybody working around in that locality?

A. Not after the accident occurred there wouldn't have been no trouble.

380 Q. How was it before, if the hole was there?

A. I couldn't tell you.

Q. Would there have been any more difficulty to see it before than there was afterwards, working around it?

A. I couldn't tell you.

Q. When you saw it on the morning of this accident did you make any sort of inspection so as to know what the character of it was?

A. I did not, sir.

Q. Did you discover any piece that appeared to be out there or simply was crushed down in the bottom?

A. I didn't notice whether it was crushed down or out. I noticed there was a hole there.

Q. You simply have a vague recollection that you saw a hole there?

A. Yes, sir.

Redirect examination by Mr. BACON:

Q. Now, as to the dirt or accumulation of earth on the crossing. State what portion of the crossing the dirt was on, generally.

A. Generally more on the centre than any other place.

Q. How was it along towards this 6 or 10 feet of the eastern line—eastern boundary of the planking—about dirt getting there?

A. Oh, there would some accumulate there during the day.

Q. About how often was that planking cleaned off?

381 Mr. STEWART: I object to that as irrelevant and immaterial. It don't seem as though he knows.

Q. I will ask you do you know how often.

A. How is that?

Q. About how often was the plank cleaned off?

A. I don't know; I should think about every other day—maybe every day. It was out of my line of business.

Mr. STEWART: You don't know anything about it, do you?

(No response.)

382 ALBERT BUCK, being sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. BACON:

Q. Mr. Buck, where do you reside?

A. Marshall, Michigan.

Q. What is your present occupation?

A. Locomotive engineer.

Q. What is your age?

A. 34.

Q. In what employ—in what company's employ?

A. I am not employed at all now.

Q. What company have you been employed by?

A. I have been employed on the Michigan Central and Northern Pacific.

Q. On what road were you employed in the month of May, 1882?

A. I was on the Michigan Central.

Q. In what capacity?

A. Locomotive engineer.

Q. How long had you been an engineer then—acting as engineer?

A. About 3 years then.

Q. Did you know Mr. Walsh, the gentleman who was running an engine on that road then?

A. Yes, sir.

383 Q. Do you know when he commenced? Did you know how long he had been acting as engineer at that time?

A. Well, I couldn't say exactly; I think, though, that he was "set up" after I was.

Q. When were you "set up"?

A. I was "set up" in 1879, I think it was.

Q. What is meant by the term "set up"?

A. Well, it is when a fireman is made an engineer.

Q. State whether there is any length of time he has to serve to become a full engineer.

A. It takes three years.

Q. What is he called in the meantime during that three years?

Mr. STEWART: I object to that as irrelevant and immaterial.

Mr. BACON: It is the name. I could state what I expected to prove, that they are called "apprentice" engineers at that time.

The COURT: For those three years?

Mr. BACON: Yes; that is what I wish to prove, the meaning of the term.

Mr. STEWART: We object to it as irrelevant and immaterial.

Mr. BACON: I propose to show that Mr. Walsh was called an "apprentice engineer" at that time because he hadn't served the three years.

384 The COURT: Well, is there any difference in the custom on railroads?

Mr. BACON: They are not entitled to full pay.

The COURT: I do not see as it makes any difference by what name they are called if he is received into that profession as an engineer and is accustomed to perform the duties of an engineer; I do not see what bearing it would have in this case.

Mr. BACON: He is received in this way; not as a full engineer, but as an apprentice engineer, and, as between him and the company, he is treated or considered as an engineer and does the duties of an engineer.

The COURT: He is employed to run a train like any other engineer.

Mr. BACON: Yes, but they take him on the ground that he hasn't full capacity and they won't give him full pay for that reason, because he is an apprentice, and that they put them to do work beyond what they acknowledged to be their capacity; that is all I expect to prove.

The COURT: I think you may show it.

Mr. STEWART: We take an exception.

Q. Well, what is an apprentice engineer?

A. Well, an apprentice engineer—always call them apprentice engineers because they don't draw full pay; it takes three years to get full pay.

Q. How does it happen that he didn't get full pay; what is the reason?

385 Mr. STEWART: Wait a minute; I object to that as incompetent and immaterial.

The COURT: It does not require his full amount of paw until three years have elapsed, as I understand it.

Mr. BACON: Perhaps it is unnecessary to press the question.

Q. Now, another question: What name did Mr. Walsh go by?

Mr. STEWART: I object to it as irrelevant and immaterial.

Mr. BACON: Well, we will pass it over; you proved it yourselves.

The COURT: You can prove his given name for the purpose of identifying him.

Q. What was his given name, do you know?

A. His given name was Adolphus.

Mr. UHL: That is already admitted.

Q. I want to know if he had another name by which he was sometimes called?

Mr. UHL: I will object to it.

The COURT: Unless there is some controversy about identification.

Mr. BACON: Lino said he didn't know his name, but that he went by the name of——

Mr. STEWART (interrupting): Wait a minute.

The COURT: I understand there is no doubt about the identification.

386 Q. Mr. Buck, another matter, this matter of coupling or uncoupling of cars in motion. What was the custom—what was the usual method in use along the line of the Michigan Central in the year 1882 about coupling or uncoupling cars in motion?

Mr. STEWART: I object to it as irrelevant and incompetent.

The COURT: I think it is competent.

Mr. STEWART: I take an exception.

WITNESS: Do you want to know the way we proceeded to couple or uncouple cars?

Q. No, sir. What was the custom, whether cars were in motion or not.

A. The cars had to be in motion. There is only once in a great while that cars will stand. A man could pull a pin without being slacked, but the general way would be you would have to slack ahead or back, whichever way you wanted to, in order to get the slack to pull the pin.

Q. State whether that has always been so, so far as you know.

A. Always been customary in my railroad experience; yes. You couldn't railroad no other way.

Q. Were you ever employed in this Niles yard?

A. Yes.

Q. In what capacity?

A. I run a switch-engine there.

Q. Do you know this 5th-street crossing there?

A. Yes, sir.

387 Q. Do you know anything about a descent or slope there?

A. There is a down grade to the west.

Q. How would it be about the necessity of motion to uncouple cars there?

A. Well, you would have to slack ahead—that is, provided you were going to the west, to pull a pin—to give the cars a start.

Cross-examination by Mr. STEWART:

Q. Mr. Buck, you say you are at present engaged as a locomotive engineer?

A. No, sir, I am not.

Q. How long since you have left the business?

A. Well, I haven't worked any for about two months now.

Q. You say that when firemen are first made engineers they are called "apprentice" engineers?

A. Yes, sir.

Q. You have been one yourself?

A. Yes, sir.

Q. State whether or not, while subjected to that time—that name—the apprentice engineer does the same work as other engineers.

A. He does.

Q. Precisely the same?

A. Yes, sir.

Q. His duties are the same, are they not?

A. Yes.

Q. And how is it as to competency; is it not often the fact that the younger engineer is much the better engineer of the two classes?

388 A. Well, not always.

Q. Well, I say isn't it sometimes the fact?

A. I don't know as I have ever noticed it that the young engineer was a better man than one of experience. I wouldn't consider it so.

Q. His ability might have something to do with it, might it not?

A. Yes; but a man to get ability as a railroad engineer has to have experience.

Q. How much experience would it take to make him a good engineer?

A. For some it takes a great deal and for some less.

Q. Precisely. It is a question of ability, isn't it?

A. Yes.

Q. Some engineers that have run a year or two will learn more than others running a much longer time, won't they?

A. Yes, sir.

Q. What were your duties while you were apprentice engineer?

A. Why, I was engineer.

Q. I say what were your duties?

A. I run on the road.

Q. What is it?

A. I say I run on the road—on the main line.

Q. A locomotive?

A. Yes, sir.

Q. Did your work right along with other engineers?

A. Yes.

Q. How long did you fire before you became an apprentice engineer?

389 A. I fired a little over three years.

Q. In what place, if you know, is the greatest skill and ability required to be used as an engineer in their work?

A. Well, that is rather a hard question. Do you mean where do they use most skillful engineers?

Q. Yes.

A. Well, we always considered that the most skillful engineers, the oldest men, were used on the passenger trains.

Q. And what *you* you say you run?

A. I run a freight. They all run about alike there.

Q. One was as good as another?

A. Yes; it was first in and then out.

Q. No difference?

A. Well, there might be difference sometimes in the special trains as regards the engine.

Q. You say all the engineers did about the same labor and were regarded——

A. (Interrupting.) All about the same.

Q. (Continuing:) Of about the same class?

A. There may be a difference maybe once in awhile.

Q. How is that with reference to all the roads you are acquainted with?

A. Do you mean as regards skill?

Q. Yes; whether substantially the rule applies.

A. Well, the other—the last road I was on they had no apprentice engineers.

Q. They were all engineers?

390 A. All drawed full pay.

Q. Then, there was no period of time that they operated their engines that they were called apprentice engineers?

A. No, sir.

Q. When he was given a position on an engine he became a full-fledged engineer?

A. Simply designated by the other name of "a young engineer," drawing the same pay.

Q. The only difference was in the pay?

A. Yes; that is all.

Q. Do you know how long Mr. Walsh had been running as an engineer at that time—at the time of the accident, in May, 1882?

A. Well, I couldn't say exactly. He must have been running in the neighborhood of two years, I should think he had been running.

Q. Well, do you know?

A. Well, I couldn't state positively; no.

Redirect examination:

Q. Now, in operating this switch-engine there, at Niles, at this crossing, suppose a train of four or five cars to be there just about partly east of the crossing, and that it was to be set in motion sufficient for uncoupling, within what distance could it be stopped if properly stopped?

Mr. STEWART: I object to that as irrelevant and immaterial.

391 Q. I will ask it in more general terms: Do you know about stopping engines—stopping a train, rather, of four or five cars when it is set in motion—for the purpose of uncoupling; are you experienced in such things?

A. Yes, sir.

Q. Now, suppose a train of four or five cars at that crossing set in motion westward, within what distance, for the purpose of uncoupling—within what distance could it be stopped?

Mr. STEWART: I object to that as irrelevant and immaterial.

The COURT: He may answer.

Mr. STEWART: I take an exception.

A. I would have to know at what speed it was going.

Q. Well, sufficient for uncoupling.

The COURT: Located at that south track and at that place?

Mr. BACON: Yes, sir.

A. Do you mean if a man is going west?

Q. Yes, sir.

A. Right along the 5th-street crossing, in that locality there, just fast enough to pull a pin?

Q. Yes.

A. That would probably be about a mile or two an hour. I should think a man ought to stop within a distance of a foot and a half.

Q. Well, what number of feet?

A. Oh, four or five.

392 Q. Suppose he is stopped, is there any need of his going back eastward—suppose he comes to a stop, is there any need of his going back eastward?

Mr. STEWART: I object to that as immaterial.

The COURT: There are so many contingencies that it seems to me it would be impossible to lay down a rule with reference to it.

Mr. BACON: Perhaps sufficient of it appears; I don't know as I need to press the matter.

Q. Just describe the motion of stopping an engine in such a case.

Mr. UHL: What case do you mean?

Mr. BACON: What he has described, moving west; when they uncouple he says it must be stopped for four or five feet. How is it done?

A. Why, reverse the engine; if you want to make a quick stop give her a little steam, too.

Q. How is it?

A. If you have to make a quick stop—stop sudden—you would give her a little steam, too, when you reverse it.

Q. How soon after such reversal would it be properly brought to

a stop, going eastward; then how many feet would it go eastward before it would be properly stopped?

Mr. STEWART: I object to that as irrelevant and immaterial.

The COURT: He may answer.

393 Mr. STEWART: We take an exception.

A. An engine hadn't ought to go very far—that is, if a man wanted to stop right there.

Q. Well, about how far?

A. Oh, a few feet; two or three feet.

WILLIAM METCALF, a witness called and sworn on the part of the plaintiff, testified as follows:

Q. What is your age?

A. 40 years.

Q. Where do you reside?

A. Niles, Michigan.

394 Q. What is your occupation?

A. I am a machinist by trade, formerly a railroad man.

Q. Have you been in the railroad business?

A. Yes, sir.

Q. In what capacity?

A. From brakeman up to conductor.

Q. In what business were you engaged during the year 1882?

A. As a freight conductor.

Q. On what road?

A. The Michigan Central.

Q. How long before said year had you been freight conductor on said railroad; about how long?

A. Three years anyhow.

Q. On what line of that railroad did you work as freight conductor?

A. I belonged to the Middle division, from Jackson to Michigan City.

Q. Does that pass through the city of Niles?

A. Yes, sir.

Q. Were you acquainted with the methods in which the uncoupling of cars was done on that railroad for two years next prior to the 16th day of May, 1882?

Objected to as irrelevant and immaterial and as a matter already gone into by the witness Buck and others. Objections overruled. Defendant excepts.

A. Yes, sir.

Q. State whether such uncoupling of cars—state how such uncoupling of cars was done; whether the cars were in motion when uncoupled.

Same objection by counsel for defendant. Objections overruled. Defendant excepts.

Q. What do you say as to whether such uncoupling was done while the cars were in motion?

A. They were as a general thing; the cars were in motion.

395 Q. State whether such uncoupling was done by having the employees enter in between the cars while they were in motion.

The same objections; also objected to because it calls for a conclusion of the witness. Objections overruled. Def't excepts.

Q. State how it was done.

A. Generally a man had to step in to pull the pin between them.

Q. Could he do it any other way?

Objected to because it calls for a conclusion of the witness. Objection overruled. Def't excepts.

A. No, sir.

By the COURT: Let this testimony be taken under a general objection.

Q. Could he do it in any other way except by entering in between the cars?

A. Not that I know of.

Q. Why were the cars in motion to be uncoupled?

A. To give them the slack of the pin—the slack of the links.

Q. Anything else?

A. In switching, the slack of the pin, and to put the car where it was wanted.

Q. Put which car where wanted?

A. The car you cut off.

Q. Suppose there were three or four cars in the train and this was the last car or fourth or fifth car; state whether the motion given for uncoupling would be communicated to the car cut off.

A. Yes, sir.

Q. Why would that be so?

A. The weight of the engine gives them the slack of the cars between the engine, and the one wanted couldn't be stopped quick enough so but what it would stop the cars.

Q. Do you know the coupling pins that were used on the Michigan Central railroad; do you know what kind of pins they were?

A. Yes, sir.

396 Q. (Showing witness a wooden model.) State whether for two years next prior to May 16th, 1882, on the Michigan Central railroad coupling pins were in common use.

A. Yes, sir; they were.

Q. Were those pins chained to anything or attached to anything or fastened at the top?

A. There was a *b*ery few new cars that had chains.

Q. To hold what?

A. From the pin to the deadwood of the car.

Q. Take the thousands of pins in use at that time. About how many would have chains, as a general thing?

A. There would be but very few of them. I couldn't tell.
Q. How did it happen that pins were used without chains?
A. They were made without them.
Q. Do you know the Delaware and Lackawanna cars, so called, in use on that road?
A. Yes, sir.
Q. Did that kind of cars ever have chains on the pins?

Objected to for the reason that the record already shows that.

Q. Suppose they wished a car to be cut off and to remain stationary right where it was for any reason, what was the method to have it stopped?
A. Either set the brake or block the wheels.
Q. Why was that necessary? What precaution was necessary to keep it stationary under any circumstances, or why was it necessary to put a block there?
A. To hold the car against the weight of the cars behind it; to stop it.
Q. To keep it from doing what?
A. To keep it from moving.
Q. What would there be to move it?
A. The weight of the engine and cars ahead of it or against it.
Q. The other cars in motion?
A. Yes, sir.
Q. That is all.

No cross-examination.

397 Hereupon in open court it was agreed that the testimony of Albert Buck would be the same in substance and effect as the testimony of the witness William Metcalf, and that such testimony should be deemed taken and presented on the part of the plaintiff subject to the same objections on the part of the defendant, duly taken, ruled upon by the court, with exceptions by the defendant, as appears in the copy of the testimony of said William Metcalf.

398 And on the trial in the Federal court, Oct. 16, 1888, the plaintiff produced as witnesses Sarah Gardner and Clement Shockley, witnesses named in Exhibits A and H, and their testimony was the same in substance as is set forth in said printed record, Exhibit H.

By consent of parties, by their respective counsel, the plaintiff's counsel read in evidence from said Exhibit H the direct examination of Dr. Evan J. Bonine, and the defendant's counsel thereupon read the cross-examination of said Evan J. Bonine as the same is set forth in said Exhibit H.

And on said trial in the Federal court, Oct. 16, 1888, the plaintiff produced as a witness Nancy J. Shockley, who was never sworn in this case on the trial in the State court, and her testimony was the same in substance and effect as the testimony of the witness Sarah Gardner.

D. B. Cook, Jonh Young, and Charles Ream were witnesses for

the plaintiff on the trial in Berrien circuit court, as appeared by said Exhibit A, wherein their testimony is set forth at large, and as appears by said Exhibit H, wherein their testimony is correctly set forth in substance and effect; but none of said three last-named witnesses testified in the Federal court.

399 And on said trial, October 16th, 1888, said plaintiff gave in evidence the defendant's act of incorporation, being act No. 42 of the Session Laws of the State of Michigan for 1846 and the acts amendatory thereof and suppletory thereto.

And on said trial, October 16th, 1888, the plaintiff further gave in evidence a wooden exhibit representing the hole in the planking mentioned in the plaintiff's declaration, and it was agreed by the counsel for the respective parties that said wooden exhibit was a fac-simile of the exhibit used on the trial in the State court.

Further, that a photographic representation of said hole as shown by said exhibit is as follows:

(Here follows photograph marked p. 399.)

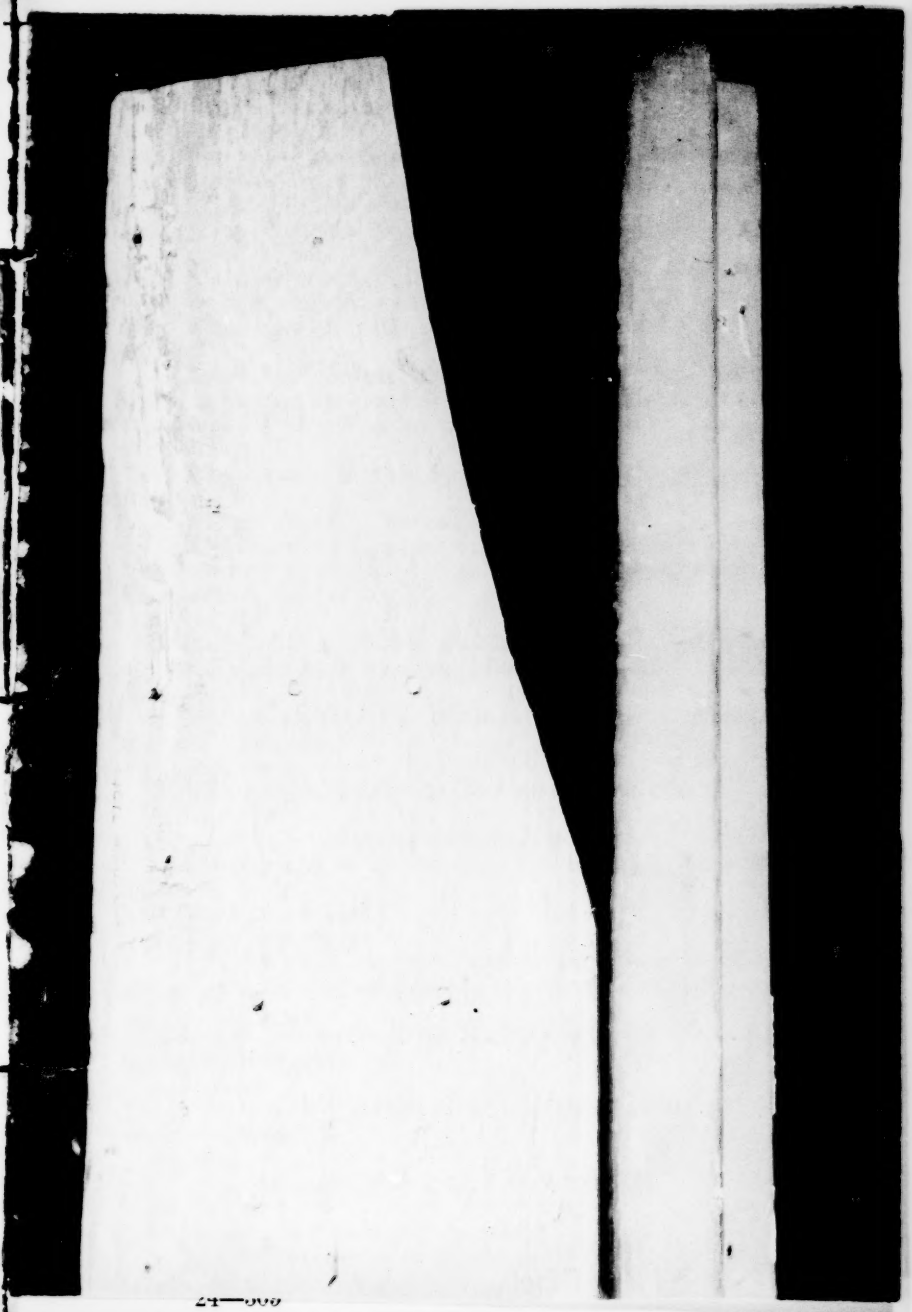
400 And thereupon the plaintiff rested.

And on said trial, October 16th, 1888, the defendant, to maintain & prove the said issue on his part, produced, as a witness, John Etscorn, and the testimony in full of said witness is as follows:

401 JOHN ETSCORN, being sworn as a witness on behalf of the defence, testified as follows:

Direct examination by Mr. STEWART:

Q. Mr. Etscorn, where do you live?
A. Niles.
Q. What is your age?
A. 32 next month.
Q. What is your business?
A. Railroading.
Q. In whose employ?
A. The Michigan Central.
Q. How long have you been in the employ of the Michigan Central Railroad Company?
A. Something over 12 years. I don't know exactly the time.
Q. Were you in the employ of the Michigan Central Railroad Company in the month of May, 1882?
A. Yes, sir.
Q. In what capacity?
A. I was night yard master at Niles.
Q. Were you sworn in this case in the Berrien circuit?
A. Yes, sir.
Q. By whom?
A. I think by Mr. Gardner or Mr. Coolidge or Bacon; Mr. Coolidge, I think.
Q. Mr. Coolidge and Mr. Bacon?



Mr. BACON: For Mr. Gardner; yes, sir.

Q. They have not called you on this trial?
A. No, sir.
Q. Now, do you remember the time that Mr. Gardner got hurt in the Niles yard?
A. I do; yes, sir.
402 Q. That was the 16th of May, 1882?
A. I think.
Q. About what time in the morning?
A. Well, it was somewheres near 5.30.
Q. What were your duties in that yard during the time you worked?
A. To see that the trains kept moving through there. I had trains to make up—regular trains, both passenger and freight trains—and to attend to the running of trains in general while in the Niles yard.
Q. What were the obligations of Mr. Gardner, if you know, at that time?
A. He was attending the east-end switches.
Q. Had he anything to do as a part of his duties with making up trains, in pulling pins, and coupling or uncoupling cars that you know of?
A. No, sir.
Q. Had you been there to work that night in this yard—the night of the 15th and morning of the 16th of May?
A. Yes, sir.
Q. You have heard the testimony here with reference to the moving of five cars?
A. Yes, sir.
Q. Who had charge of those five cars at that time?
A. I did.
Q. What were you going to do with them?
A. I was going to throw them up and get them ready for trains.
Q. Were they loaded?
A. They were empty.
Q. Who, if anybody, was to assist you in that work?
403 Had you ordered anybody to assist you in that work?
A. No, sir.
Q. Do you remember of Mr. Walsh coming in there that morning with his engine?
A. Yes, sir.
Q. State whether you instructed him that you wanted him to do some switching.
A. I did.
Q. Was that the switching of these five cars?
A. Yes, sir.
Q. Did he hitch on finally to them?
A. Yes, sir; as soon as he could get his engine ready.

Q. Now, had you ordered anybody to throw a switch or couple or uncouple any of those cars that morning?
A. No, sir.
Q. Who was doing the work that morning?
A. Switching?
Q. Yes, sir; and coupling and uncoupling.
A. I was.
Q. Had you looked for anybody to assist you in doing it with reference to those cars at that time?
A. Not in particular; no, sir; not that I know of.
Q. Who threw off the first car?
A. I did.
Q. Where did you take it?
A. Down the south track.
Q. Did you get on top of the car?
A. Yes, sir.
Q. Did you become aware at any time that morning that Mr. Gardner was about the yard?
A. I did.
Q. When?
404 A. Shortly after I cut off that one I cut off.
Q. Where were you?
A. I was right there on the south track; either there or on the car. I don't recollect.
Q. Did he say anything to you?
A. He did.
Q. What was it?
A. The first I noticed of him he was a little west—north of me.
Q. How far west from 5th-street crossing?
A. Well, I couldn't say exactly; couple of rods; probably a couple or three rods, as near as I can remember, and about the same distance north of the south track.
Q. (Showing witness paper.) Which do you call the south track? Do you recognize that?
A. Yes, sir.
Q. Which is the south track?
A. It — this one. This is the south track (indicating).
Q. Where were —, when you first became aware of Mr. Gardner's presence, with reference to this track?
A. Somewhere between this switch and this crossing.
Q. Where does this switch go?
A. Into the freight-house track—in the freight-house?
Q. Where does that one run to?
A. It runs north of the freight-house.
Q. West?
A. Yes, sir.
Q. Now, what was said—who spoke the first word at that time?
A. Mr. Gardner.
Q. What did he say?
A. He says, "What next?"
Q. And what did you say?

405 A. As near as I can remember, I said, "One in and come and get the one that was right down there"—"One in and come and get this one."

Q. Is that all that was said?

A. That is all I remember of being said.

Q. Now, sir, did you at any time instruct him to go between the cars and pull pins?

Mr. BACON: That is a leading question. I object to it.

The COURT: Well, it is a leading question, Mr. Stewart.

Q. Well, state what, if anything, more was said.

A. No, sir.

The COURT: You can ask if there was anything said about Gardner uncoupling cars.

Q. State what, if anything, was said by you to Gardner about coupling or uncoupling cars.

A. No, sir.

Q. Was there anything whatever?

A. No, sir.

Q. State whether or not you intended to do that coupling and uncoupling yourself that morning.

A. I did.

Q. And had so instructed the engineer, Mr. Walsh?

Mr. BACON: I object to that.

Q. State whether or not you had said anything to Mr. Walsh—told Mr. Walsh prior to that time that you were going to handle these cars so and so.

A. When we changed the engine we had a hot box. I went down and asked him how he was fixed—the usual way of
406 speaking. He says, "I have got a hot box." He says, "I will be ready pretty soon," or words to that effect. I told him I had some work to do just as soon as he was ready, and we was going to use his engine and him to do the work, and, just as soon as he got ready, to come down by the freight-house and get some cars.

Q. Did you tell him who wanted him?

A. No, sir; I just told him we had some work to do. Then they go according to signals.

Q. When was the first you knew that somebody was hurt that morning?

A. I can't recollect whether I had got down off of this car that I had cut off or whether I was on top of the car.

Q. Well, what was the first evidence you knew of somebody being hurt?

A. I heard some hollering, screaming and hollering, and I got down and swung the engine off and saw Mr. Gardner on the crossing.

Q. You saw Mr. Gardner, looking down the track?

Mr. BACON: I object to that as leading. That is leading of the worst kind.

Q. State what you saw the engineer do, whether you caught his eye or not.

A. I don't know whether I did or not. I gave signals.

Q. Who did you give them to?

A. They were intended for the engineer. I don't remember whether he was looking towards me.

Q. Well, do you know whether the signals were at once obeyed?

A. I think they were; yes, sir.

407 Q. Do you know where this first switch is east of 5th-street crossing?

A. Yes, sir.

Q. State whether or not that is a switch frequently used.

A. Yes, sir; it is.

Cross-examination by Mr. BACON:

Q. Mr. Etscorn, I will just ask you a few questions: Mr. Batchelor was the yard master?

A. Yes, sir.

Q. He wasn't there at nights?

A. No, sir.

Q. Mr. Gregg has spoken of switchmen that Mr. Batchelor had under him. They didn't work both night and day, those same men?

A. Part day and part night.

Q. Now, sir, don't you know that the men that worked nights—the only ones of them that were there at night was Mr. William Kingsley, yourself, and John Walker?

Mr. STEWART: I object to that as irrelevant.

Q. (Continuing:) And Mr. Gardner?

A. That is four, isn't it?

Q. Yes.

A. Yes, sir.

Q. Well, now, sir, for some time before this accident and at the time of the accident how many worked daytimes? All the rest worked daytimes, didn't they?

A. Yes; including Mr. Batchelor, the yard master.

Q. Batchelor is counted one and you are counted one?

A. Yes, sir.

Q. And at the time of this accident and for some time

408 before William Kingsley quit working at midnight?

A. Yes.

Q. That left John Etscorn and John Walker. Then wasn't John Walker and Mr. Gardner there *there* on the whole watch from midnight until 7 o'clock in the morning, didn't it?

A. Yes, sir.

Q. Well, sir, then John Walker went down west every morning, didn't he?

A. Yes.

Q. Wasn't he frequently gone a half an hour?

A. Well, not when there was work to do. It was according to how the trains run. He had to attend the west-end switch.

Q. When John Walker was gone, Kingsley was gone, that left you the sole representative to attend to the switches, didn't it?

A. To do the switching; yes, sir.

Q. So that the number was reduced to one when he was gone?

A. Yes; as far as attending to the cars was concerned.

Q. Now, at the time this accident happened where was John Walker?

A. I don't remember. I couldn't say.

Q. Don't you know he was down on this west end?

A. He was down there somewheres. I don't remember just where he was then.

Q. So you was the sole man up there at the time this
409 accident happened to do all the coupling and uncoupling, were you?

A. Yes, sir.

Q. You didn't need any help, did you; you didn't think of having any help?

A. Well, I didn't expect any. The way I had been working the best I could. We did all the work we could. What we couldn't do we left for some one else to do.

Q. There was no lack of force; you could do it just as well as if you hadn't any men to help you, could you?

A. Oh, no, sir.

Q. Wasn't the most of the work just about that time in the morning—wasn't there more to do at that time of the morning than there were other hours in the day?

A. There is *was* more work in the morning than in the evening.

Q. That was the busy time?

A. Yes.

Q. Wasn't there several trains to be made up at that time that needed quite a good many cars at that time?

A. Yes, sir.

Q. A great deal of coupling and uncoupling of cars to be done at that time?

A. Yes, sir.

Q. Now, sir, you were sworn at Berrien; you recollect that perfectly well?

A. Yes, sir.

Q. You knew you were sworn to tell the whole truth and nothing but the truth, did you?

A. Yes, sir.

Mr. STEWART: You examined him, Mr. Bacon. I suppose you ought to know.

Q. We will come to this diversion now.

Mr. STEWART: Put it all in; read all of it.

410 Mr. BACON: I will get it in a moment here (referring to printed record).

Q. You didn't testify at Berrien, did you, that you answered Mr. Gardner that he was to attend to that car that you had down there west—you didn't swear to anything of that kind?

Mr. STEWART: Wait a moment. I object to that as leading.

WITNESS: I didn't understand the question.

Q. Did you swear when Mr. Gardner said, "What next?"—did you swear at Berrien that you told him that he was to do something with the car that you were then on?

Mr. STEWART: No; I don't think he did.

Q. Did you testify to anything of that kind?

A. The car that I had cut off?

Q. Yes, sir.

A. I don't think I did.

Q. You never swore to that until you swore to it to-day, did you?

A. That question again!

Q. You never testified when he said, "What next?" that you answered to Mr. Gardner that he was to do something with the car that you cut off. You never testified that you answered him until to-day, did you?

A. No, sir.

Q. Do you remember of testifying as follows at Berrien (I will read from page 30): "It was a part of my (witness's) duty; had not required the services of plaintiff in any capacity, and had not
411 asked him to help him that morning; thinks plaintiff was under his direction at that time, and if he told him to do anything supposed he was to do it; thinks he was a superior in the employ of the company to plaintiff." Did you testify that way?

A. Yes.

Q. Was that true?

A. Yes, sir.

Mr. STEWART: It was true as you understood it, I suppose?

Q. You was——

Mr. UHL (interrupting): We object to it as incompetent.

The COURT: I think it is a conclusion of the witness as to his own authority. The facts should be shown and let the inference be drawn by the proper person.

WITNESS: If you will read that question, please.

Q. Did you testify at Berrien as follows: "Thinks (meaning you) that the plaintiff was under his direction at the time; witness had charge of the yard, and if he told him to do anything supposed he was to do it, and he thinks he was a superior in the employ of the company to plaintiff." Did you testify so?

A. Yes, sir; I think I did.

Q. Well, sir, you were night yard master?

A. Yes, sir.

Q. Mr. Gardner was under your direction at night, wasn't he?

A. Yes.

Q. You had the same authority as Mr. Batchelor?

412 A. Yes.

Mr. UHL: One moment. I move to strike that out as incompetent,

Mr. BACON: I don't know how else I can prove it. He is the only man that knows. Mr. Batchelor has sworn to it, and Mr. Gregg, and he has, and Mr. Dolliver.

The COURT: It is pretty far along in the case to raise that question. It has been shown—I think both sides have assumed that he was yard master there. I think it is competent to show what were the duties performed by a yard master, what were customarily performed by yard masters in the business at that point. That may be shown. A conclusion of his own as to the extent of his authority probably would not be evidence.

Q. Did Mr. Batchelor in the daytime, or while he was present tell Mr. Gardner what to do?

A. Yes, sir.

The COURT: That is about the same thing.

Q. Who had the direction of Mr. Gardner at night?

Mr. UHL: We object to that as immaterial and incompetent.

Mr. BACON: He must have been working under somebody. Who was the man he was working under?

Mr. UHL: It appears in evidence that he was a switch-tender, employed to perform that particular duty.

The COURT: It may be shown who, as a matter of practice,
413 commanded in the yard; who, as a matter of fact, did.

Mr. UHL: We take an exception.

Q. Who, as a matter of fact, did have control in the yard while Mr. Batchelor was gone?

A. I was.

The COURT: If there is any question about it you had better save your exception.

Mr. UHL: We did save an exception, your honor.

Q. To whom did you first communicate when Gardner asked you "What next?" and you told him that he was to do something about the cars you then had cut off, as near as you could recollect? Who did you first communicate that to?

A. I don't remember of saying anything to him about the car I had cut off.

Q. You don't remember of saying anything to who?

A. Gardner.

Q. You didn't?

A. No, sir.

Q. When he asked you, "What next?" you answered him, didn't you?

A. Yes, sir.

Q. You knew he referred to the work, didn't you?

A. Yes, sir.

Q. Now, sir, didn't you testify on that trial in words following——

Mr. STEWART: What page is that on?

Mr. BACON: Page 28. I will just read a little of that testimony so that you may—I will commence reading a short portion of it:

414 "JOHN ETSCORN, sworn and examined by counsel for plaintiff, testified that he was in the employ of the defendant, and had been a little over eight years; recollect when plaintiff was hurt; witness was switching up there; had charge of the road nights; couldn't tell what plaintiff was doing that morning; didn't see him; just before he got hurt he was standing a little way from that track that he claimed he got hurt on—the last he saw of him; couldn't tell whether he helped make up any trains or couple or uncouple any cars; didn't see him.

Q. Did you give him any directions about it?

A. I cut off a car and got on top of it to ride it down on the south side, and he spoke to me; I think he said—witness further testified that plaintiff spoke to him and asked him, 'What next;' that he, witness, told him, 'One in and one out,' and came down.

Now, sir, do you remember that? Do you remember swearing to that?

A. I don't remember of swearing to "One in and one out;" I don't know whether that is correct or not; I don't know whether I swore to that or not. As near as I can remember now, I said, "One in and come down and get that one"—or "down to this one."

Q. When did it first occur to your mind to put in these words and change it from "one in and one out," as you swore to it before? When did that first come to your mind?

415 A. Well, it has always been in my mind that way.

Q. How did you come to leave it out when you were sworn before?

Mr. STEWART: You were examining him before.

Q. How did you come to leave it out?

A. I didn't know as I left it out.

Q. Didn't you testify when he said, "What next?" that you answered him, "One in and one out"? Don't you remember of testifying to that?

A. I didn't.

Mr. BACON: I will read in evidence that part of his testimony.

Mr. STEWART: Read all of it.

Q. Did you testify that way? If you did testify that way, was it true or was it untrue?

A. I couldn't say.

Q. Can you remember better now in 1888 than you could when that trial took place in February, 1884? Can you remember it better now in 1888 than you could in February, 1884?

A. I don't think I could.

Q. On which occasion would your memory be most likely to be correct, on the former trial or this?

A. Well, I should think it would probably be on the former trial, because it hadn't been so long.

Q. Then the changing your answer that you gave has come to you since that trial, hasn't it?

A. I don't know as it has.

416 Q. If you did answer him "One in and one out," that would refer to uncoupling, wouldn't it.

A. Yes, sir.

Q. A car that was on the train?

A. Yes, sir.

Q. That hadn't been uncoupled?

A. Yes, sir.

Q. One in and one out; where did that mean; where?

A. One in on the freight-house track and one out on the south side; that is what it would mean.

Q. Now, sir, didn't you further testify on that trial in words following, after giving your answer, "that you came down there and put the one he (witness) was on right down there; then, as near as you can remember, as I rode that car down to the freight-house track, he heard him holler; witness jumped down and ran up there and saw him lying on the crossing, hurt." Didn't you testify that way ay Berrien?

A. I think I did.

Q. Then you were on top of the car when you heard him hollering, wasn't you?

A. I don't remember exactly, now; I was either on top of the car or near the car or getting down.

Q. If you testified that you were on top of the car at the trial in Berrien, in 1884, it is probably true, isn't it?

A. Yes.

Q. If you did testify that way, you have no doub- but you was on top of the car when you heard him holler?

A. No, sir; I have no doubt but I was on top of the car.

Q. And the hollering that you heard was his screaming when he was hurt?

417 A. Yes, sir.

Q. Did he scream more than once?

A. I don't remember.

Q. Now, sir, wasn't his question to you, instead of "What next?" "Where do you want those cars"?

A. No, sir.

Q. Or, "What is to be done with the other cars"?

A. No, sir; all I can remember is, "What next?" Those are all the words I remember of him saying.

Q. You had known Mr. Gardner coupling and uncoupling cars before that, hadn't you?

A. Yes, sir.

Q. Hadn't you known of his doing it within a very few days before that accident?

A. I don't remember how long it was, but he had been doing it

Mr. UHL: We object to that as immaterial.

The COURT: It may stand.

Mr. UHL: Note an exception.

Q. Didn't you testify at Berrien in these words: The question was asked you, "Had he been assisting you or aiding you for some time back?" and didn't you answer, "Well, occasionally"?

A. Yes, sir.

Q. That was true, was it?

A. Yes.

Q. Wasn't you sick at one time, not a great while before this accident, and left him and John Walker to attend to the whole matter there for some time?

A. I don't remember.

418 Mr. UHL: We object to it as irrelevant and immaterial.

Mr. BACON: All right.

Redirect examination:

Mr. STEWART: I wish to read here a part of his testimony, the balance of his testimony in the other court that has been referred to by Mr. Bacon.

Mr. BACON: I will consider it as read; what I have read to him is part of the testimony.

Mr. STEWART: What you have read; why didn't you read all?

Mr. BACON: I wish it to be considered as read to the jury as impeaching testimony.

Mr. STEWART (reading): "Was night yard master 16th of May, 1882; had been up to that night. I had charge of the yard nights; don't remember of a freight train coming in from the west that morning and stopping there; it was time for such a train, but don't remember its coming in; remember of those five cars attached to an engine spoken of; don't remember the time in the morning they were making these shifts; somewheres about 5 o'clock; thinks he made a statement in this case about May 24th, 1882. Witness observes on the statement the time in the morning; is not sure that was the time, 5.30, but thinks it was; couldn't tell how many cars were attached to the engine at this time; might have seen Mr.

418½ Gardner every little while all that night; with reference to the movements of the engine and five cars talked about, became aware of the presence of Mr. Gardner that morning after he had cut off this one car; sent that car down the south track; this runs north of the freight-house; he spoke to the witness, and so became aware of his presence; asked witness, 'What next?' The first words spoken between them were by plaintiff to witness; had not asked of plaintiff that morning any assistance whatever, as he remembers of; thinks he would have uncoupled these cars himself if plaintiff had not; it was a part of witness' duty; had not required the service of plaintiff in any capacity, and had not asked him to help that morning." The balance of it has been read.

419 JOHN ETSCORN, being recalled for further examination by Mr. STEWART, testified as follows:

Q. Mr. Etscorn, on this 16th day of May, 1882, what do you say as to whether you had your usual amount of help in making up trains that morning, the same help you had been having?
A. The same help we had been having.
Q. Was there any shortage in help that morning from what there had been other mornings?
A. No, sir.
Q. Had you any more than the usual amount of work to do that morning either?
A. I don't think I did. I don't remember extra.

Recross-examination:

Q. One man was plenty to do it all, wasn't he?
A. To do what I could.
Q. Well, wasn't he plenty; one man was all that was necessary to do all that coupling and uncoupling that morning, wasn't he?
A. Well, I don't know; one man could do what he could of it.

Redirect examination:

Q. You only had five cars there?
A. We only had a hold of five cars at the time.

Recross-examination:

Q. There was no other train there that morning to attend to?
A. I don't remember whether there was any more there or not.

And the testimony of said witness given on the trial in the State court as appears by said stenographer's translation, Exhibit "A," is in full as follows:

JOHN ETSCORN sworn for the plaintiff.

Direct examination by Mr. COOLIDGE:

Q. Are you in the employ of the M. C. R. R. Co.?
A. Yes, sir.
Q. How long have you been such?

—. —.

420 Q. Do you recollect when Mr. Gardner was hurt?
A. Yes, sir.
Q. What were you doing that morning?
A. Switching up there.
Q. What position did you hold?
A. I had charge of the road nights.
Q. Was Mr. Gardner working under you at that time?

STEWART: I object to that as calling for a conclusion of the witness.

Q. Tell what Mr. Gardner was doing that morning.

A. The morning he got hurt?
Q. Yes.
A. I could not tell; I didn't see him.
Q. What had he been doing a short time before he got hurt?
A. Just before he got hurt he was standing a little ways from that track that he claimed he got hurt on, the last I saw of him.
421 Q. Did he help make up any train that morning, or couple or uncouple any cars?
A. That I could not tell; I didn't see him.
Q. You didn't see him?
A. I didn't see him in the act; no.
Q. Did you give him any directions about it?
A. I cut off a car and got on top of it to ride down on the south side, and he spoke to me. I think he said——

STEWART: I object to this, as I did before, upon the ground that it is hearsay, irrelevant, and immaterial.

(Obj. overruled, and def't excepts.)

Q. State what your conversation with him was that morning.
A. He spoke to me and asked me what next. I think that is the words he said. I told him one in, and come down and get
422 that one. I was riding down then, as near I can remember. As I rode that car down to the freight-house track I heard him hollow. I jumped down and run up there, and saw him lying on the crossing, hurt.
Q. Had he been assisting or aiding you for some time back?
A. Well, occasionally.

STEWART: I object to that as irrelevant and immaterial.

Q. What did he do there?
A. Where?
Q. I mean in aiding you. What did he do?
A. Sometimes he would cut cars off; sometimes couple them; sometimes tend switch; other times he would ride cars down.
Q. How long had he done that business before the accident happened?
423 A. I don't remember.
Q. Some time?
A. Well, yes.
Q. Was Mr. Bachelor about the yard mornings?
A. Not as I remember of; I didn't pay no attention.
Q. What time did Mr. Bachelor get around there?
A. Sometimes I would see him before I went home; sometimes I would not.
Q. What time did you quit?
A. 7 o'clock.
Q. Same time Mr. Gardener did?
A. Yes, sir.
Q. Will you state again what your possition or your duty was in the yard the morning of the accident?

A. I had charge of the yard nights.
Q. Under whom did you work?
A. I worked under Bachelor.
Q. What was Bachelor's duties?
A. Yard master.
Q. When this accident happened was Mr. Gardener there
424 in the yard? Was it part of the yard duties, I mean?
A. Yes, sir.
Q. Was he acting under you at that time?
A. Well, yes; I think he was.
Q. Did you see the place where the accident happened—notice it?
A. I just noticed it, that is all—that is, where he claimed he got hurt.
Q. Did you see the hole?
A. I saw a hole in the plank there; yes, sir.
Q. Had you seen it before?
A. No, sir.
Q. Did you put your foot in it to try it?
A. No, sir.

Cross by Mr. STEWART:

Q. You say that you was night yard master?
A. Yes, sir.
Q. On the 16th of May, 1882?
A. Yes, sir.
Q. You had been up that night?
425 A. Yes, sir.
Q. Do you remember of a freight train coming in from the west and stopping there that morning?
A. I don't remember. It was time for a freight train, but I don't remember its coming in.
Q. You remember of these cars attached to an engine spoken of in the case—5 cars?
A. Yes, sir.
Q. What time in the morning was it that you were making these shifts?
A. That I could not tell you. I don't remember.
Q. You could not tell whether it was 5 o'clock or 6 o'clock?
A. Somewhere about 5 o'clock, but I don't remember sure.
Q. Did you make a statement in this case?
426 A. I think I did.
Q. About May 24th, '82.
A. I think I did; I will not be positive, though.
Q. Will you look at that and state whether that is the statement?
A. That is my statement; yes, sir.

(Statement marked Ex. B.)

Q. Do you observe upon that the time in the morning?
A. Yes, sir. I am not sure whether that was the time; I think it was, though.

Q. What time was it?
A. 5.30.
Q. How many cars were attached to the engine at this time?
A. I don't remember.
Q. 4 or 5?
A. I could not tell; I don't remember how many there was.
Q. When and where did you first see Mr. Gardener that morning?
427 A. I might have seen him every little while; all night I might have seen him every little while.
Q. With reference to the movements of this engine and the 5 cars we have been talking about, when did you first become aware of the presence of Mr. Gardener?
A. After I had cut off this one car.
Q. Where did you send that car?
A. Down the south track.
Q. What do you mean by the south track?
A. That is, the south track called the south track there in the yard—south-side track?
Q. Does that run north of the freight-house?
A. Yes, sir.
Q. Now, after you had cut that off you say you first became aware of the presence of Mr. Gardener?
428 A. Yes, sir.
Q. Will you state in what way?
A. He spoke to me, asked me, What next? I think, and then I told him—as near as I can remember, I told him, One in, and come down and get the one I was riding down.
Q. The first words that were spoken between you were by him to you?
A. Yes, sir.
Q. Had you asked of him that morning any assistance whatever?
A. No, sir; not as I remember; I don't remember.
Q. Who would have uncoupled these cars if Mr. Gardener had not?
A. I think I would.
Q. It was a part of your duty, was it?
A. Yes, sir.
429 Q. Had you required the services of Mr. Gardener in any capacity that morning; had you asked him to help you?
A. Not that I remember of.
Q. Was Mr. Gardener under your direction at that time?
A. At that time I think he was. I had charge of the yard to see that the work was done; if I told him to do anything I supposed he was to do it.
Q. Was you a superior in the employment of the company to Mr. Gardener?
A. I think I was.
Q. What did your duties embrace in that yard?

A. To see that the work was done, and see that trains got in and out regularly—way freights.

Q. Were you to do anything yourself?

A. Yes, sir.

Q. What?

430 A. Do this work—switch and couple cars.

Q. What else? The employment of Mr. Gardener was to switch and couple cars and all that, to-, wasn't it?

A. That I don't know.

Q. Well, did he do it?

A. I think he did; yes, sir.

Q. Up to this time when this occurred had Mr. Bachelor appeared in the yard?

A. I don't remember of seeing him.

Q. Hadn't seen him at all?

A. Not as I remember of that morning.

Q. What time did he come to his work that morning?

A. I could not tell.

Q. When did you first see him?

A. I don't know as I saw him at all that morning—not that I remember of. I don't remember of seeing him.

Q. Do you remember what car it was he cut off?

431 A. I don't.

Q. Do you know whether it was a D., L. — W. blue?

A. I think it was; I would not be positive; it is so long ago I have forgotten.

Q. Do you remember what car was next to it?

A. I don't.

Q. Do you remember whether it was M. C.?

A. I don't; no, sir.

Q. Do you remember how the brake hung on the M. C.?

A. No, sir.

Q. Don't remember anything about that?

A. No, sir.

Q. I understand you to say that you were placing these cars there that morning yourself?

A. Yes, sir.

Q. And was not aware of Gardener's presence at all until he spoke to you?

A. No, sir.

432 Q. Where was Mr. Gardener lying on the crossing when you first discovered him?

A. I don't understand you.

Q. When you got down off the car after you heard Mr. Gardener hollow, where was he lying with reference to the west end of the plank on the crossing?

A. I could not tell exactly where he was lying.

Q. How near to that?

A. Somewhere about the center; might have been a little west of the center. I could not tell just exactly where it was.

Q. Had you any talk with Mr. Gardener there?

A. I don't remember.
Q. How light was it at that time?
A. I could not tell. I don't remember how light it was.
Q. Was the sun up?
433 A. I don't remember.
Q. I understood you to say that you never noticed this defect in the plank until after the accident.
A. Not to my knowledge I didn't.
Q. Did you see Mr. Gardener go between the cars?
A. No, sir.
Q. Where was he standing when you first saw him?
A. I should judge he was standing about a rod from the south track, as near as I can remember.
Q. East or west from you?
A. About northeast.
Q. How near to 5th street?
A. A little west of 5th street, I think.
Q. From that time until you heard him hollow, what time elapsed?
A. Not over 5 minutes, I don't think.
Q. How far had your car gone?
A. About 6 or 8 rods, I guess.
434 Q. That is all?
A. That is all.
Q. From the time he spoke to you and you heard him hollow your car had gone from 6 to 8 rods and it was moving when he called your attention?
A. I don't remember whether it was moving or whether I had it stopped. I could not tell that. I was on top of the car, at the brake.
Q. As soon as you got it stopped what did you do?
A. I got down.
Q. State whether or not it was moving when he called to you.
A. I could not tell that.
Q. It had been detached from the other cars?
A. Yes, sir; it was all alone.
Q. It was all alone?
A. Yes, sir.
Q. Do you mean to say that you remained on top of the car after you had it stopped?
435 A. Sometimes we do.
Q. How is it in reference to this case—did you remain on top of this car after it had stopped?
A. I don't know whether I did or not.
Q. Or did you get right down and go about your work?
A. I could not say.
Q. Did you take any measurement of that break in the plank?
A. No, sir.

436 And on said trial, Oct. 16, 1888, the counsel for the defendant read in evidence the deposition of Edwin D. Batchelor, and a copy of said deposition in full is as follows:

Q. Mr. Batchelor, where do you live?
A. Dakota Territory.
Q. Give us your full name, age, and occupation.
A. Edwin D. Batchelor; age, 47; occupation, farmer.
Q. What place in Dakota do you live?
A. Day county.
Q. How long have you lived there?
A. Four years last August. It was five years, I think, last August.
Q. Is that still your home and residence?
A. Yes, sir.
437 Q. You are here on a temporary visit?
A. Yes, sir.
Q. When do you expect to return?
A. Some time in March.
Q. What was your business before moving to Dakota?
A. Yard master, Niles, Michigan.
Q. Yard master of what?
A. Michigan Central yard at Niles.
Q. How long were you yard master?
A. Four years, nearly.
Q. When did you leave the employ of the Michigan Central Railroad Company?
A. The 20th day of August, 1882.
Q. What were your duties as yard master?
A. Supervision of all yard work—making up trains and charging men.
Q. What men?
A. All yardmen, all switchmen, and yardmen with the making up of trains.
Q. Well, how are the men in the yard divided as to occupation by name—what classes?
A. For-men, assistants, and helpers.
Q. What in the classification of them?
A. Switchmen and switch-tenders.
Q. General helpers?
A. Yes, sir.

Mr. BACON: Don't lead him.

Q. Are you acquainted with Frederick Gardner, the plaintiff in this case?
A. Yes, sir.
438 Q. How long prior to the time you left the employ of the Michigan Central Railroad Company had you known him?
A. About four years?
Q. Were you in the employ of the company when he entered its employ—Mr. Gardner?

A. Was I?
Q. Yes.
A. I think not; I think he was to work there before I came, but not in the yard.
Q. Where was he at work when you first entered the employ of the company—Mr. Gardner I mean by "him"?
A. Working in the freight-house at Niles.
Q. What was he doing there?
A. General helper in the freight-house, I suppose.
Q. Did these men come under your charge as yard master in the freight-house?
A. No, sir.
Q. Was his employment ever changed from the freight-house to any other branch in the employ of the company?
A. He left the freight-house to go to work for me in the yard.
Q. About when was that?
A. I think in the fall of 1881—I cannot state what date—or summer of 1881.
Q. How came he to be changed from the freight-house to your employ?
A. I would give him better pay than he could get in the freight-house.
Q. How much pay?
A. $45 a month, I think.
Q. Well, when he entered your employ I suppose you mean your employ as yard master of the Michigan Central Railroad Company?
A. Yes, sir.
Q. You were still working for the railroad company?
A. Yes, sir.
439 Q. What was the character of the employment that you gave him?
A. Tending switches in the east end of the yard at Niles.
Q. What do you mean by "tending switches"?
A. Changing them from one track to another; let trains in and out in the east end of the yard.
Q. What were his hours of labor?
A. From six in the evening until seven in the morning.
Q. I suppose by "east end" you mean east of the depot grounds—east of the depot on Fifth street?
A. No; east of the 5th-street crossing.
Q. East of 5th-street crossing?
A. Yes, sir.
Q. Where was the west yard, the west end; where did that begin?
A. It ran as far west as the freight-house or a little further, probably.
Q. Is 5th street the division?
A. The division; yes, sir.
Q. Between what is known as the east and the west ends?
A. Yes, sir.

Q. Now, I believe you sta-d what a switch-tender was. What is the difference between a switch-tender and a switchman?

A. Switch-tender attends to switches and has nothing to do with making up the trains when I had control of the yard there.

Q. Well, during the period of time that you were yard master?

A. Yes, sir; that is what I mean.

440 Q. Who else aside from yourself, if any one, had the power to hire and discharge men?

A. No one but myself.

Q. In your capacity?

A. In my capacity.

Q. In your branch of the business, from whom did these various men that were under you take their directions?

A. Took it from me.

Q. State whether, at any time prior to the 16th day of May, before that time, 1882, your attention had been called in any way to Frederick Gardner's attempting to assist in the coupling and uncoupling of cars in making up trains.

A. I think not; only he got in and pulled a pin and got hurt.

Q. Yes, sir; that is what I mean.

A. That was all.

Q. Were you aware, prior to that time of his getting hurt, as you state, in getting between the cars, that he was in the habit of assisting in making up the trains and coupling and uncoupling cars?

A. I was not.

Q. When was this time that he got between the cars?

A. I think in November, 1881.

Q. Did you have any talk with him at that time?

A. Yes, sir.

Q. At that time, after you had learned of what had happened to him?

A. Yes, sir.

Q. What was that talk?

A. I told him that I didn't hire him to do that kind of work and wanted him after that to stay out of there; stay away from

441 it altogether, to have nothing to do with pulling any pins for anybody, as it wasn't his duty.

Q. Did you ever in any way countermand those orders?

Mr. BACON: I object to that question on the ground that it calls for his construction of what he may have said and his conclusion in general.

(Question read.)

A. No, sir.

Q. Did you ever have any other conversation with him about that subject before the accident of the 16th of May, 1882, and after the time of his being hurt, as testified to?

A. I think I spoke to him several times about it.

Q. Well, what did you say to him at those times?

A. I told him I didn't hire him to do that kind of work and

didn't want him to do it; he wasn't paid for doing that kind of work.

Q. What kind of work did you mean?

A. Pulling pins and switching.

Q. Helping to make up trains?

A. Yes, sir.

Q. Was there any man under you that had the right or power to give any different directions than you did——

Mr. BACON: I object to that as calling for his conclusion—his opinion and his construction of what may have been said in general.

(Question read.)

—(continuing) to Mr. Gardner?

A. No, sir.

442 Q. Do you know John Ectsorn?

A. Yes, sir.

Q. Was he one of your yard masters?

A. He was night foreman in my place.

Q. Had he any right or power to countermand or change your instructions and orders to the men?

Mr. BACON: I make the same objection to that.

A. No, sir.

Q. Do you remember the occasion of Mr. Gardner's being hurt on 5th crossing on or about the 16th day of May, 1882?

A. Yes, sir.

Q. What time in the morning did you first learn of that accident?

A. I think about five or six o'clock in the morning.

Q. What time did you go there, if you did go, or did you go to the spot where the accident occurred; and, if so, when?

A. About six o'clock, I think.

Q. About six o'clock in the morning?

A. They sent for me to come down there.

Q. Where did you go?

A. Went down to the place. I first went to the Sykes house, where Gardner was.

Q. Well, did you visit 5th street?

A. I then went to the crossing where they stated he got hurt.

Q. What time in the day was it when you got to the crossing?

A. Probably half apast six in the morning.

Q. Was anybody else there at that time?

A. I don't remember. There may have been some others standing around or there.

443 Q. Do you know whether it was after or before the general crowd got there?

A. I think it was before.

Q. Now, did you make any observations or any inspection of the ground at that place to see what had been done after you got there?

A. I looked over the planking where they stated Gardner got hurt—the crossing planking on the crossing.

Q. How does 5th street run with reference to the railroad?

A. North and south—crossing the yard.

Q. Crossing the road at right angles?

A. Yes, sir.

Q. What was the condition of the roadway across the track? Was it left in a natural state or was it planked?

A. All planked across the track.

Q. What, if anything, did you discover upon an examination of the planking of this crossing where it was said Mr. Gardner got hurt?

A. I saw marks as if something had been dragged across the plank.

Q. Was there any difficulty in determining where the dragging apparently first commenced?

A. No, sir; I think not. The mark was plain on the street—on the crossing.

Objected to as calling for his opinion.

Q. Now, how near or how far from the east end of this planking was it that marks of dragging first showed themselves?

444 A. About ten feet from the east end of the planking.

Q. West from the east end, I suppose you mean?

A. Yes, sir.

Q. On the crossing?

A. On the crossing.

Q. What do you say as to whether or not that planking on the crossing was a good and sufficient planking for that street?

Mr. BACON: I object to that as calling for his opinion and conclusion, and as improper.

A. It was supposed to be in good condition.

Q. Had your attention ever been called or had you noticed in any way any defect or anything wrong with the planking on that crossing?

A. No, sir.

Q. State whether or not your attention was called to what at that time was said to be the car that Mr. Gardener was between or one of the cars that Mr. Gardener was between when the accident occurred.

A. My attention was called to the car that was stated was the one that run over him or hit him.

Q. Where was it standing at the time when your attention was called to it?

A. I think on the freight-house track. I think it was.

Q. Well, with reference to the crossing, whether it was east or west from the crossing?

A. Oh, west from the crossing.

Q. How far?

A. Oh, probably ten rods.

Q. Did you go to that car?

A. Yes, sir.

445 Q. Do you remember what was the number of it?

A. I took the number down—"520, M. C. R. R."

Q. What does the "M. C. R. R." mean?

A. Michigan Central railroad.

Q. Did you make an examination of the car?

A. Yes, sir.

Q. Of which end?

A. Of the west end of the car.

Q. What was its condition when you examined it, as to being in good repair?

A. It was apparently in good running order.

Q. Any defects about it that you noticed or observed?

A. No, sir; the brake was run rather low on that class of cars; that is all.

Q. What class of cars did it belong to—new or old style?

A. Old style of cars.

Q. What do you say as to whether or not it was in all respects the same as that style——

A. Yes, sir.

Q. (Continuing:) —pattern of car?

A. Yes, sir; the same as that style of car at that time, so far as I could see.

Q. Now, what, if anything, did you discover about the west end of this car that you speak of?

A. I found some threads—looked to be out of overall stuff—on the bolt head, on the north side of the car—on the brake.

Q. On the brake on the north side of the car?

A. Yes, sir.

446 Q. What part of the machinery did the bolts, the heads of which you saw, fasten?

A. Run through the brake-shoe through the beam.

Q. Then they were the bolts that held the brake-shoe to the beam?

A. To the brake-beam—yes, sir; to the brake-beam and brake-head.

Q. Were there one or more nuts fastened to these?

A. Generally two bolts with two set of nuts on each bolt.

Q. Which way does the end of the bolt stand with reference to the brake-shoe, out towards the end of the car or under?

A. The nuts are put on the outside of the brake-beam, bolts running through and the nuts on the outside.

Q. So that the end of the bolts and not the head of it would be to the west as that car stood?

A. As they stood—yes, sir.

Q. State any reason, if you have any, why you were particular about instructing Gardner not to attempt to couple or uncouple cars.

Mr. BACON: I object to that as assuming that the witness gave

this instruction, which varies materially from the statement of the witness.

(Question read.)

A. Because of his being old and not being lively enough to do such work, and as he had a large family to support.

447 Q. How were the rules—what were the rules and regulations, Mr. Batchelor, or do you know what the rules and regulations of the company were with reference to any men in its employ going between cars while they were in motion for any purpose?

Mr. BACON: I object to that, that these rules should be produced; that there should be better evidence than the memory of the witness at this remote time; the evidence exists in writing in printed form.

A. I think there were printed rules forbidding them pulling pins between cars while they were in motion.

Mr. STEWART: That is all at this time.

Cross-examination by Mr. BACON:

Q. How long were you in the employ of the Michigan Central Railroad Company, at Niles, as yard master; that was your office, wasn't it?

A. Yes, sir; about four years.

Q. During that time there was no usual practice of coupling or uncoupling cars except while they were at a dead standstill, was there?

Mr. STEWART: I object to that as irrelevant and immaterial.

A. Yes, sir; there was.

Q. What was the usual practice?

A. It was the practice to cut them off when they were running, just as it happened; they might have been standing still and

448 they might have been moving; they didn't always wait for them to stop.

Q. It is true, isn't it, that it is an easy thing to uncouple cars at a dead standstill, and that it is very practicable to do so generally?

A. It isn't always in that yard practicable, because the slack—there is no slack to the train to pull them in standing still.

Q. What prevents the slack in the yard?

A. Being on a grade; down grade west.

(By Mr. STEWART:)

Q. It is down grade west, is it?

A. Yes, sir. Most of our switching is done in the east end of the yard, so, of course, the slacking would all be done to the west, you see.

(By Mr. BACON:)

Q. There is no need of this slack for uncoupling cars, is there, as a general thing?

A. You have to have a slack or you couldn't pull the pin.

(By Mr. STEWART:)

Q. Under certain circumstances, I suppose?

A. Yes, sir.

(By Mr. BACON:)

Q. How did these nice printed rules work in uncoupling cars without slack, at the standstill, in that yard?

A. They didn't work very well always.

Q. Don't you know as well as you know that you are sitting here that those rules never were enforced in that yard?

A. Not always enforced.

Q. Don't you know that they were not generally enforced?

449 A. Not generally.

Q. Don't you know that in that yard throughout the time you were employed there, at Niles, for the uncoupling of cars there was some motion given——

A. (Interrupting.) Usually.

Q. (Continuing:) —to the train?

A. Usually had to be to pull the pins; cars would run themselves after they were cut off.

Q. What is your present employment, Mr. Batchelor?

A. Farming.

Q. Who pays your expenses from Dakota here?

Mr. STEWART: I object to that as irrelevant and immaterial.

Mr. BACON: I will put it in another form.

Q. Isn't it true that the Michigan Central Railroad Company have, by passes or otherwise, contributed to your expenses from Dakota to Michigan more than once on this——

Mr. STEWART: I object to that as irrelevant and immaterial.

Q. (Continuing:) —on this business, I will put in there.

Mr. STEWART: Same objection to that question as the question now stands.

A. No, sir. More than once, he says?

Mr. STEWART: Yes.

WITNESS: No, sir.

450 Q. You came to the former trial of this suit, didn't you, as a witness?

A. Yes, sir.

Q. You are here now as a witness?

A. Yes, sir.

Q. Both times paying your own expenses, are you?

Mr. STEWART: I object to that as irrelevant and immaterial.

A. No, sir.

Q. Now, sir, you state that Frederick Gardner was employed as a switch-tender, not as a switchman?

A. Yes, sir.

Q. He never was employed as a switchman at all?

A. Not by me—no, sir.

Q. That you know of?

A. No, sir.

Q. What is the difference between the employment in that yard of a switchman and a switch-tender?

A. Switch-tender opens and closes switches for trains to go in and out and engines to move around the yard, and the switchmen have the making up of the trains, coupling cars and uncoupling them.

Q. Does the switchman do anything else besides coupling and uncoupling cars?

A. Why, they have no other work to do only to see that the trains get in and out.

Q. The switchman, then, has nothing to do with setting or moving the switches?

A. Not in the east end of the yard. Along in my time there they had nothing to do with it whatever.

451 Q. *Q.* Who was the switch-tender in Gardner's place during the day while he was in your employ—in the employ of the Michigan Central Railroad Company there?

A. I had no regular switchman there.

Q. Switch-tender took his place in the daytime?

A. We had no one to attend to it regularly daytimes.

Q. Well, who attended to it irregularly on the daytime?

A. Whoever wanted to go up with the switch-engine—some of the switchmen. Some of the switchmen would be around there, but no regular-appointed switch-tender for the east end of the yard, days.

Q. Well, sir, Gardner being a switch-tender through the night in *foris*, give the names of the switchmen during the night—say in April and the first sixteen days of May, 1882.

A. I don't know, only—I can't state, only Etscorn was foreman. I don't remember who he had working under him at that time.

Q. Now, taking it at other parts of that yard, were the duties of the switchmen and switch-tenders entirely separate, as you state, would be different men aid one—do the duties of both?

A. They done the duties of both days.

Q. Who did it?

A. Different switchmen.

Q. Done the duties of both days?

A. Yes, sir.

Q. Do you remember the names of any of them?

A. There was Walker—John Walker—and Collins, I think, was working, days.

452 Q. They did the duties of both switchmen and switch-tender?

A. And switch-tender; yes, sir.

Q. In common usage are not the names frequently used so as to include both duties—switchmen and switch-tender?

Mr. STEWART: I object to that as calling for a conclusion and as irrelevant and immaterial.

A. It might be; yes, sir.

Q. Your business was yard master?

A. Yes, sir.

Q. During the spring of 1882?

A. Yes, sir.

Q. Now, you quit work about what time in the evening, and about what time did you go to work in the morning?

A. Generally left the yard about six or half apast in the evening, and came between half apast six and seven in the morning.

Q. How far did you live from the yard?

A. About two blocks.

Q. While you were so absent during the night no yard master was present at all, was he? The yard was without a yard master?

A. No, sir; my foreman was in my place and answered for me.

Q. Who was the night foreman?

A. John Etscorn.

Q. He was only authorized to do a few things in your place and the yard was in part without any yard master during the night, wasn't it?

A. No, sir; he had full authority to act in my place, to
453 use my name, and trainmen had to obey his orders as well as mine.

Q. He had no such general authority to give orders during your absence as you had when present, though, had he?

A. He had full authority over the men, nights, in my absence, to use my name for the work.

Q. He couldn't do it with as full power as you could, though, could he, and to that extent the road was without a yard master at night, wasn't it?

Mr. STEWART: I object to that as irrelevant, immaterial, and not a proper question.

A. I stated before that he had full authority in my place when I was absent, nights.

Q. Did that last until you got back in the morning?

A. Until I came on duty in the morning.

Q. Was there any other name for his duty, was he called "assistant yard master," or did you have no other name for him besides "foreman"?

A. "Night foreman" we always called him.

Q. That was the only name you knew he was called?

A. Yes, sir.

Q. Now, Mr. Gardner's employment as a switch-tender was to be confined to the territory in the yard east of 5th street, wasn't it?

A. Yes, sir.

Q. He had nothing to do with any switches that were in the limits of 5th street, had he?

Mr. STEWART: Hold on; let the witness thoroughly understand.

454 A. He had to see that the switches were all right and attended to switches east of 5th-street crossing.

Q. What do you mean by the "crossing," the plank or the entire breadth of the street?

A. The entire breadth of the street.

Q. That street is about a four-rod street, isn't it, as near as you can remember?

A. I should say it was; yes, sir.

Q. Then he had nothing to do with any switch inside of the limits of that street, had he?

A. West of the street he had nothing to do with it.

Q. Well, within the limits of it, inside of the street.

A. There was none in the limits of the street that I know of.

Q. You don't know of any switches within the limits of that street, do you or did you?

A. I think not; I think there wasn't any in there, in the highway.

Q. His duties were east of the limits of that street?

A. Supposed to be east of the crossing street.

Q. Who had charge next west of him?

A. Well, Etscorn and his men under him had charge of the other switches and the work; had switchmen in the west end of the yard the same as in the east end.

Q. What was the pay of the switchmen, this Walker that you speak of?

A. I think they got $45 a month; it might have been more; I don't remember.

Q. Is your memory now better than it was when you were
455 sworn on the trial at Berrien concerning the matters in this suit, or has it had the least effect from the lapse of time?

A. I think not.

Q. About how many years ago were you sworn on this trial concerning this suit at Berrien Springs, Berrien county, Michigan?

A. I think it was four years ago.

Mr. STEWART: It will be four years in February, I guess.

WITNESS: Yes, I think so.

Mr. STEWART: The 7th day of February we began that trial, Mr. Bacon.

Q. This coupling and uncoupling cars was a dangerous business, wasn't it?

A. Considered so; yes, sir.

Q. The business of a switch-tender was not dangerous, was it?

A. No, sir.

Q. Excepting the case of Gardner, was there any other switch-

tender on the employ at that yard in the spring of 1882 whose business did not extend to coupling and uncoupling cars?

A. There was a switch-tender in the west end of the yard.

Q. I mean was there any other one whose business did not extend to coupling and uncoupling cars?

A. Yes; there was another man in the west end of the yard.

Q. What was his name?

A. Sampson.

Q. He was a switch-tender?

A. Yes, sir.

Q. He wasn't to couple and uncouple cars?

456 A. No, sir.

Q. Where is that man now?

A. I guess he is at Niles yet. I don't know.

Q. What switch-tenders did assist in coupling and uncoupling cars that were at that yard in the spring of 1882?

A. What switch-tenders?

Q. Yes.

A. Why, none. None of my switch-tenders helped that I know of.

Q. Did any of the switch-tenders couple and uncouple cars at that yard?

A. I stated the switchmen attended the switches and helped make up the trains, too, days, but there was no authorized switch-tender to attend these switches in the daytime. At night we had one for each end of the yard.

Q. Then you had authority to require a switch-tender to assist in coupling and uncoupling cars, did you or did you not?

A. Yes, sir; I had authority to have each man do any work I would see fit for him to do.

Q. Now, you swear that your orders to Gardner not to do any coupling or uncoupling of cars were, as near as you can recollect, in November, 1881, or about that time?

A. About that time; yes, sir.

Q. Who was present when you gave him these orders?

A. I don't remember of any one being present.

Q. Who was present when you ever at any time afterwards talked with him on that subject?

A. I don't remember of anybody's being present.

457 Q. Do you remember talking to him at any time afterwards on that subject?

A. I remember of speaking to him about it frequently about it.

Q. And you always repeated over exactly the same thing, did you?

A. Yes, sir.

Q. You are sure of that?

A. I was surprised that he was there switching cars and got hurt because I had forbid him doing it beforehand.

Q. Now, from the time you first ordered him not to do any coupling or uncoupling of cars until the time of the accident, May 16th, 1882, you never knew or heard that Gardner was doing anything about coupling or uncoupling cars there, did you?

A. I didn't suppose he was doing it contrary to my orders.

Q. Well, you never had heard of it?

A. No, sir; never heard of it.

Q. Is it true, then, that e-st of 5th street in the spring of 1882 there was no man whose duty it was to assist in coupling and uncoupling cars at that yard and who was switchman or switch-tender in the night-time?

A. Gardner was the switch-tender and Etscorn had a man or two with him, or supposed to have, to help him do this work.

Q. Can you give us the names of any men he had with him for that purpose?

A. I think that Walker was the man who was with him. I won't be certain.

Q. Then you testify that Etscorn in the spring of 1882, at
458 the Niles yard, had in the employ of the company under him some man or men whose duty it was to assist in coupling or uncoupling cars east of 5th street, do you?

A. There were two men there in the yard—I don't know what they were doing—what they might have been doing—besides the two switch-tenders.

Q. Who were the two switch-tenders?

Mr. STEWART: He has told you.

Q. Who was the switchman in the east end of the yard by day, in the spring of 1882?

A. John Lion, days.

Q. Foreman, or what?

A. Of the switching work in the yard, days.

Q. The entire yard?

A. Yes; supervision of it all.

Q. Well, when you were testifying on the trial concerning this accident at Berrien, you testified that in your examination of the crossing and the marks on it on the morning that Gardner was hurt you saw no defective plank or hole in the planking at that crossing, didn't you?

A. Yes, sir.

Q. That testimony was true, wasn't it?

A. Yes, sir.

Q. You testify now, then, that in your examination on the morning of the 16th of May, 1882, shortly after Gardner was hurt and when you saw these indications of something being dragged on the planking you saw no defect in any plank, no hole in any plank on that crossing, and no place that seemed to be out of order in said crossing, do you?

A. I think there was nothing that I noticed that morning.

459 Q. You never noticed any hole there at any other time that you can swear to, did you?

A. No, sir.

Q. You didn't know that there was a hole or a bad place or defect in any plank of that planking at any time?

A. I don't remember of seeing any bad spots.

Q. Never knew anything about any such place there?

A. Not to amount to anything; no.

Q. Well, when did you first become acquainted with one that didn't amount to anything—with the defect there that didn't amount to anything?

A. Well, there might have been a car off and the end of the plank broke down a little; there might have been, but nothing that I would think would be dangerous.

Q. You didn't see any such thing on the morning that you saw these marks?

A. I didn't examine it to see; no, sir.

Q. You have no recollection of seeing any such place after Gardner was hurt there, have you?

A. I think not. I don't remember of anything without it was this indentation in the plank; there might have been a car off and the end of the plank where it struck split down a little.

Q. You don't remember that, do you, or do you say that——

A. (Interrupting.) There might have been something of that kind.

Q. Well, do you remember?

A. No; I don't remember.

460 Q. I don't ask you what there might have been. You have no recollection of seeing any such place in 1882?

Mr. STEWART: He said he didn't look for it.

WITNESS: I didn't look for it. I saw a mark made as though something dragged over it. I didn't look for anything else.

Q. You didn't hear anything said on that occasion about any hole or defect in the plank?

A. No, sir; I did not.

Q. Nothing was said about it that day that you remember of, was there?

A. Not that I remember of.

Q. Well, sir, did you that month of May, 1882, that you remember of?

A. Not that I remember of; no, sir.

Q. You spoke of Gardner getting hurt when you gave him orders not to do any coupling or uncoupling. How did he get hurt?

A. By pulling a pin behind an engine, a through engine, road engine.

Q. Was he coupling or uncoupling?

A. Pulling a pin.

Q. Is that for uncoupling?

A. Uncoupling.

Q. It means uncoupling, then?

A. Yes, sir.

Q. Was that done in your presence?

A. No, sir; in the night-time when I wasn't there. I stated to him that it was a lesson to him to stay out from between the cars at that time.

Q. Then you did know of his assisting in coupling and uncoupling on that occasion?

461 A. I knew of it afterwards.

Q. And that is the only time you ever knew of——

A. (Interrupting.) Of his doing any work of that kind.

Q. Except at the time of the fatal injury?

A. Yes, sir.

Q. Now, Mr. Batchelor, don't you remember that you had a conversation with Frederick Gardner within a few days before the 16th of May, 1882, when he received this injury, say about the 7th of May, 1882?

A. I don't think I had any conversation with him about it at that time.

Q. Don't you remember having a conversation with him at the water tank about the 7th of May, 1882, one morning, and there was something said about helping making up trains in the morning or in mornings; that the trains didn't get off well, and there must be help done about it?

A. I don't think I had any conversation with him in regard to it.

Q. With whom did you have a conversation with about it?

A. If it was anybody it would be the night foreman.

Q. Who was that?

A. Etscorn.

Q. Well, have you any recollection of any such conversation?

A. I certainly wouldn't have told Gardner to go and do this work after forbidding him to do it.

462 Q. You never in your life change- an order or change- your mind?

A. Not in regard to him I didn't; no, sir.

Q. Did you in regard to anybody else?

A. Not in regard to their work in the yard.

Q. You never changed an order or changed your mind?

Mr. STEWART: I object to that as irrelevant and immaterial.

A. Not an order. I change my mind.

Q. Did you ever change an order?

A. Not in regard to Gardner's work in the east end of the yard.

Q. Well, did you about other work?

A. Not that I know of, in the yard.

Q. You had power to change orders?

A. I had power; I had authority in the yard; yes, sir.

Q. And other yard masters frequently do change orders?

A. I don't know what they do.

Q. You never did?

A. I didn't in regard to this case of Gardner's.

Q. Did you, though, in regard to other cases?

A. I might change men to different work.

Q. Didn't you change orders frequently, just li-e other men?

Mr. STEWART: I object to that as irrelevant and immaterial.

A. Each set of men had to do their work; they had their

463 work to do. They were hired to do that work, and that was the only class of work I had for them to do there.

Q. You frequently changed that, didn't you?

A. No, I don't think I did, because I didn't have occasion to change it.

Q. You don't remember of ever changing a single order you gave?

A. Not in regard to Gardner; no, sir.

Q. You had full authority to do so, hadn't you?

A. I had full charge of the yard; certainly.

Q. Now, don't you remember of having with Mr. Frederick Gardner, about the 7th of May, 1882, a conversation like this: "Fred., I want you to help the boys in the morning;" and Gardner replied, "John (that is John Walker) goes down to the west end and leaves John Etscorn along;" and you said, "He can't do *uht* work alone; I want you to help him." Gardner said, "All right," and continued: "You told me once that I shouldn't do this work—I should have nothing to do with it." You answered him, "I can't help it now; the trains don't get off in the morning. The South Bend train is pretty late every morning. We haven't got men enough to get the cars ready. You must help him." And Gardner said, "If that is the case, that I must help him, I suppose I will have to do it;" or a conversation to that effect?

A. I don't think I ever ordered him to do the work in that place; I am positive I didn't.

Q. Don't you remember *w*hat when you were sworn at Ber-
464 rien concerning this matter you were asked this question: "After that length of time, wouldn't your memory be a little weak as to the conversation?" and you answered, "It might."

A. I remember the question; yes, sir.

Q. Did you answer "It might"?

A. I think I did.

Q. Was that true?

A. It might at that time.

Q. Has it got better since?

A. I don't know as it has got better. I had time to reflect over it—study the matter over. Being called right up and without any forethought, I might have answered it in that way.

Q. But now your memory has improved?

A. It has on that point. It is just as plain as it was then, because I studied it over after answering the question.

Q. You don't pretend, then, but what you might have stated that to Mr. Gardner? Do you remember that question being put to you and you answered, "I think I shouldn't have told him to do that work after forbidding him before to do it. It wasn't my way of doing; had no positive recollection about the matter; don't remember whether Gardner did help Etscorn before this accident in making up trains; might have done so; don'e know that he did; don't think he did; recollection is clear that I forbid him to do it; forbid him when we hire- him; also when he got hurt the first time, in November before"? Do you remember your answer to that effect?

A. I don't remember just the answer to it; no, sir.

465 Q. Don't you remember of answering any question on this subject concerning such a conversation with Mr. Gardner, "that you have no positive recollection about the matter," when you were sworn?

A. I think I might have answered it in that way.

Q. Well, was it true?

A. Why, yes, sir. I didn't have time to study the matter over. I was called right up and put on the stand without much forethought, but after I studied it over I knew that I must have certainly been mistaken when I stated that I might have had the conversation with him.

Q. Then, by studying it over, you came to the conclusion that you must have made a mistake in what you testified to there?

A. No, sir; I concluded that I had n- such conversation with him.

Q. Now tell us what made you come to that conclusion.

A. Because I had frequently forbid him doing the work; that Etscorn didn't know that he was there; didn't know that he was helping him or anything.

Q. That was the reason?

A. That was one reason; yes, sir.

Q. What other reason?

A. Well, another reason was if I had told him to help I wo-ld also have informed John Etscorn that John Gardner or Frederick Gardner had to help him.

Q. Was there any other reason that led you to this
466 conclusion?

A. That is all; about all the reasons.

Q. You have now fully described, have you, the reasons from which you concluded that you might have made the mistake that you have spoken of when you testified at Berrien?

A. Yes, sir.

Q. Now, that car on which you found shreds of overall, this car 520, did you see any indications of flesh or blood on that car?

A. I think there was a little blood on the brake-shoe and shreds of overalls on the nuts or bolts that stuck out on the brake-beam.

Q. That was a new car, wasn't it?

A. No, sir.

Q. It was in excellent repair, wasn't it?

A. It was in fair running order, the same as the other cars of that capacity and number.

Q. About what was its age?

A. Well, I couldn't *gibe* you the date it was built.

Q. Well, are you a judge of cars? How many years old they are?

A. I should suppose it had been running, oh, maybe eight or ten years. I should suppose so from the number and the build of the car.

Q. When you arrived in the yard that morning, May 16, 1882, the usual switch-engine was there in full operation, wasn't it?

A. Usual?

Q. That one, the ordinary switch-engine, was there when you got there?

A. I think not.

Q. What had become of it?

A. I think it had been ordered away on the road some place.

467 Q. What kind of an engine did you find operating in its place?

A. I think a road engine was there to work.

Q. A freight engine?

A. A freight engine; yes, sir.

Q. That engine was run by a man by the name of Walsh? He was engineer, wasn't he?

A. I kind of think so.

Q. It had often been to work there at that yard as a yard engine before, hadn't it?

A. Not often; no.

Q. You had seen him operating before, hadn't you, this same man, as a yard engine?

A. As a yard engine?

Q. Yes.

A. No, sir.

Q. Never had seen him operating there, eh?

A. He came in the yard.

Q. You never had seen this engine operating as a yard engine before, had you?

A. It might have been there before.

Q. Do you remember seeing it?

A. Not that I remember; no. Any road engine we took and used for a switch-engine when they were in there.

Q. This engine that Walsh was operating had air brakes, didn't it?

A. No, sir.

Q. The usual engine there, the yard engine, the one that belongs in the yard——

A. (Interrupting.) The one that we had in the yard has air brakes on, not to handle freight trains with, but to handle passenger cars.

Q. The air brakes don't assist in managing the locomotive and tender at all, do they?

468 A. It might in a measure; yes, sir.

Q. Well, didn't the same freight engine that Walsh run come in with the passenger train that morning or that night?

A. I cannot state whether it did or not. I don't think any of their regular switch-engines has air brakes on.

Q. What?

A. I say I don't think any of their regular switch-engines has air brakes on—that is, in the big yards.

Q. The little building near the east limits of 5th street in the Michigan Central Railroad Company's yard called the "office" wasn't constructed in May, 1882, was it?

Mr. STEWART: I object to that as irrelevant and immaterial.

A. It was; yes, sir.

Q. Did you use that office before that—before this injury to Gardner?

A. I had used it when I first went there.

Q. Well, had you been using it recently before it?

A. Not immediately before I hadn't.

Q. Why?

A. Because it belonged to the car department; the car shops were located there; formerly I had the car department and the switching and the yard, too, and then I used it.

Q. It wasn't your duty to look after the condition of the planking in 5th street?

A. No, sir.

469 Q. Whose duty was it?

A. It was——

Mr. STEWART (interrupting): I object to that as irrelevant and immaterial.

A. (Continuing:) —the road master's duty to see it was in proper order.

Q. Who was the road master?

A. George Dolliver.

Q. About how many men did he have as assistants or employees under him——

Mr. STEWART: I object to that as irrelevant and immaterial.

Q. (Continuing:) —who might look after the condition of the planking in the line of their duty?

A. I think there was a foreman had a gang of men that looked after the yard.

Q. Who was the foreman?

A. I cannot tell the foreman's name.

Q. How many did he have?

A. Well, about five, I should say, or six.

Q. What was their business?

A. To keep the yard up and to look after the crossing and so on.

Q. All those persons that you have mentioned were in the employ of the Michigan Central Railroad Company, were they not?

A. Yes, sir.

Q. What is the length of the Niles yard from east to west, the limits, how far apart are they?

A. Half a mile, I should think.

Q. About how many tracks were there crossing 5th street?

470 A. I think there was—let me see—about six, I think.

Redirect examination by Mr. STEWART:

Q. Mr. Batchelor, so far as you know, did any of the officers or men interested in the Michigan Central Railroad Company know that you were coming here in this vicinity until after you arrived?

A. No, sir.
Q. On this trip?
A. No, sir; I think not.
Q. You know this man Walsh?
A. Yes, sir; I used to be acquainted with him.
Q. (Continuing:) Whose name*d* has been mentioned?
A. Yes, sir.
Q. What was he?
A. He was what was called a "thorough engineer" on the road.

(By Mr. BACON:)

Q. A what?
A. A through man; a through engineer we called him.

(By Mr. STEWART:)

Q. On the road?
A. On the road, hauling through freight.
Q. Had he a nickname?
A. I think they called him "Pumpkin."
Q. Do you know why?

Mr. BACON: We object to this as a matter of opinion and no foundation laid to show the learning of the witness or his sources of reasoning and opinion.

Q. Do you know why?
A. He was a short, thick-set fellow; that is all the reason I know for it; "Punk" they used to call him; I think he was running on the road when I was running a train; I think I have run with him.
471
Q. He is a short, thick-set man?
A. Yes, sir; about as wide as he is long.
Q. Did you ever know or hear of any objection to him as a competent engineer?
A. No, sir; I never did.

Recross-examination by Mr. BACON:

Q. About how far east of 5th street did the Niles yard extend in the spring of 1882?
A. About half a mile, I should think; nearly that; I couldn't tell.
Q. Now, about how far west of 5th street did it extend?
A. Thirty rods, probably.
Q. Now, about how many switches were there east of 5th street, in the spring of 1882, for Gardner to attend to?

Mr. STEWART: I object to that as irrelevant and immaterial.

A. Well, probably a dozen switches, maybe.
Q. How many?
A. Oh, a dozen, I should think, that he had charge of there; maybe more.
Q. Extending over the half a mile?

A. No; he hadn't to go over the whole length of the yard; he didn't have to go to the "Nigger crossing" (we called it).

Q. About how many yards?

A. About thirty yards, I should think.

Q. About a dozen switches for him to attend to?

472 A. About a dozen; somewhere along there.

Q. About how old a man should you take Gardner to be when he was hurt?

A. About forty.

And on the trial in the State court the testimony of said witness, Edwin D. Batchelor, as set forth in the said stenographer's translation, Exhibit "A," in full, is as follows:

E. D. BATCHELOR sworn for the defendant.

Direct by Mr. STEWART:

Q. Where do you reside?

A. In Dakota Ter.

Q. How long have you lived there?

A. A year ago last August.

Q. Where did you reside before you went to Dakota?

473 A. Niles, Mich.

Q. What was your business in Niles?

A. Yard master for the M. C. R. R. Co.

Q. How long was you engaged in that business for that company?

A. A little over 4 years, I think; about 4 years and half a month or so.

Q. Are you acquainted with the plaintiff in this case?

A. Yes, sir.

Q. How long have you known him?

A. I think about as long as I was there at Niles.

Q. Do you know whether or not he at any time was in the employ of the M. C. R. R. Co.?

A. Previous to my coming there?

Q. No. While you were there was he?

A. He worked for me in the yard.

474 Q. Was he working for you or the company?

A. He was working for the company subject to my orders.

Q. How long had he worked there in the yard?

A. I cannot give you the date that he commenced.

Q. About when?

A. I should think some time in the spring previous to this accident.

Q. Spring or fall?

A. Some time in the summer, I should say.

Q. Summer of what year?

A. Of '81.

Q. What were his hours on duty?

A. From 6 in the evening until 7 in the morning.

Q. Do you remember the occurrence of Mr. Gardener being squeezed between the cars in any way?

A. Yes, sir.

Q When was that?

A. It was Nov. in '81.

475 Q. Did you ever have any conversation with Mr. Gardener in reference to coupling or uncoupling cars?

A. I think I had several conversations with him about it.

Q. Did you ever give him any instructions in regard to what he should do?

A. Yes, sir.

Q. About that?

A. Yes, sir.

Q. What were they?

A. Instructions not to pull any pins or do any coupling in any way.

Q. Did you ever countermand those orders?

A. No, sir.

Q. After these instructions to him did you ever tell him to go forward and do that kind of work?

A. No, sir.

476 Q. I understand you Mr. Gardener was under your immediate employ?

A. Yes, sir; he was.

Q. In the same yard?

A. Yes, sir; in the same yard.

Q. Doing the general night-work in the yard?

A. Yes, sir; I had full control night and day.

Q. Mr. Gardener was subject to your orders to do such work as you required in the yard?

A. Yes, sir.

Q. Do you remember the occasion of his injury, on the 16th of May, '82?

A. Yes, sir.

Q. You were not there when it occurred?

A. No, sir.

Q. What time did you get down to the station that morning?

A. I think about six o'clock, as near as I can remember.

Q. Where was Mr. Gardener at that time?

A. At the Saxe house.

477 Q. Did you learn of his having been injured?

A. They sent for me to come down.

Q. Was your attention called to the crossing upon which he was injured?

A. I went and looked at it.

Q. What did you find?

A. Marks of where he was dragged was about all I could see.

Q. On the plank?

A. On the plank.

Q. On the south track?

A. Yes, sir; on the south track.

Q. Will you look at that map and see whether it correctly represents the tracks there?

A. Yes, sir; that is as it was.

Q. It was on this crossing?

A. Yes, sir.

Q. Now, will you state where the appearance of dragging commenced on the plank?

A. I should say down about in here somewhere.

478 Q. How far from the east end of the plank?

A. About 8 or 10 feet probably.

Q. How near to where the dragging commenced did you observe any blood?

A. I think below where the dragging commenced I saw blood.

Q. And the appearance of dragging was from 8 to 10 feet from the east end of the plank?

A. Yes, sir; I should say so.

Q. At that time did you discover any defect in the plank?

A. No, sir; I didn't.

Q. At the end of the plank on the north side of the rail?

A. Never remember seeing anything or noticing it; didn't afterwards notice it particularly.

Q. When was your attention first called to a defect in the plank?

479 A. I don't remember noticing any or having my attention called to it at all.

Q. Was it called to it that morning?

A. I don't remember as it was.

Q. Did you ever see anything on the north side or was your attention ever called to anything on the north side of the north rail of that south track at 5th-street crossing that looked like that?

A. I don't think I remember any such a place. I should certainly have thought of it or seen it if it had been there, because I was over it a good many times a day, and around there.

Q. Do you remember what car it was that run against Mr. Gardener and threw him down?

A. It was——

COOLIDGE: He didn't see it.

Q. Was a car pointed out to you that was said to be the car?

480 A. Yes, sir.

Q. What car was pointed out to you as the car that run against Mr. Gardener?

COOLIDGE: To that I object as hearsay.

COURT: How were the cars standing; in the same position?

STEWART: I don't know.

COURT: Might find out about that, perhaps.

STEWART: I will offer the report made by the witness, Etzcorn.

COOLIDGE: We would be glad to have you read it.

Q. After you inspected the crossing that morning was your atten-

tion called to any car that was said to be the car that run against Mr. Gardener?

A. Yes, sir.

Q. What was the number of that car?

A. Mich. Central, number 520.

481 Q. What was the condition of the car as to repair?

A. Well, it was an old car, but apparently in good running order.

Q. Nothing defective about the car?

A. No, sir; I think not.

Q. The class of cars then run by the M. C. R. R.?

A. Yes, sir.

Q. Where did the brake-beam hang upon that car; was it high or low?

A. It run low; the beam and shoes did.

Q. Describe it as compared with some other kind of cars.

COOLIDGE: To that I object.

STEWART: I don't know that I care about it; he says it hung low.

Q. Where do I understand you to say the appearance of dragging commenced with reference to the east end of this crossing?

COURT: He has testified to that; hardly worth while to go
482 over it again.

Q. Did you have any conversation with Mr. Gardener on the 7th of May, '82, in the evening, at the east tank, in which you ordered him to assist Etzcorn the next morning to couple cars?

A. I don't have any recollection in regard to it at all.

Q. What do you say as to whether you did have such a conversation or not?

A. I don't think I had any such conversation with him.

Cross by Mr. COOLIDGE:

Q. You worked during the daytime, didn't you?

A. I had charge day and night.

Q. But you were not around nights?

A. No, sir; not usually.

Q. What time did you generally leave in the evening?

483 A. Six o'clock generally.

Q. What time did you get around in the morning?

A. Six or 7 o'clock.

Q. Who was in charge of the yard at night?

A. John Etzcorn.

Q. He had charge of the yard at night?

A. Yes, sir.

Q. During what hours did he have charge?

A. From six until seven in the morning.

Q. Six in the evening?

A. Six in the evening until 7 in the morning.

Q. During that time he occupied your place, didn't he?

A. He done the work under my name, of course.
Q. But he had charge of all the work?
A. Yes, sir, he had control.
Q. The same as if you had been personally present, didn't he?
A. Yes, sir.
484 Q. Where was your office at that time?
A. At what time?
Q. At the time of the accident, I mean, and a short time before.
A. I think I didn't have any at that time; they hadn't built one yet for me; they was going to, but hadn't at that time.
Q. Were you in the habit of crossing 5th-street crossing often?
A. Yes, sir.
Q. You were there nearly every day, were you not?
A. A good many times a day.
Q. You say you didn't notice this?
A. No, sir; I didn't notice anything of that kind there.
Q. You didn't learn it was there until the day of the accident?
A. No, sir.
485 Q. Did you see it then?
A. I don't remember seeing anything of that kind there.
Q. Then you didn't see any defect?
A. Not in regard to that; no, sir.
Q. No hole of any kind?
A. No, sir.
Q. On the day of the accident?
A. No, sir; I didn't.
Q. When did you leave the employ of the M. C. R. R. Co.?
A. 20th of Aug., 1882.
Q. After that length of time wouldn't your memory be a little weak as to a conversation?
A. It might.
Q. You don't pretend, then, but what you may have stated that to Mr. Gardener?
A. I think I should not have told him to do that work
486 and forbid him before to do it. It was not my way of doing.
Q. You have no positive recollection about the matter, have you?
A. No, sir.
Q. Do you recollect whether Mr. Gardener did work there in helping Mr. Etzcorn for some time previous to this injury?
A. Please ask the question again.
Q. Do you recollect whether Mr. Gardener did help Mr. Etzco-n in making up trains for some time before this accident?
A. No; I don't remember it.
Q. He might have done it?
A. He might have done it; yes, sir.
Q. You might have known of it, might you not?

STEWART: I object to that.

Q. Do you recollect whether he did or not?
A. I don't know that he did.

Q. What do you think about it?
487 A. I don't think he did.
Q. You don't think he did?
A. No, sir.
Q. Your recollection on that point is not very clear?
A. It is clear. I forbid him doing it.
Q. When was that?
A. When I hired him; also after he got hurt the first time.
Q. That was in Feb. before?
A. No, sir.
Q. Well?
A. In Nov. before, I think.
Q. You say he was hired in Oct.?
A. I didn't say what day he was hired. I have not got any account of it with me.
Q. Had he been assisting Mr. Etzcorn then?
A. When?
Q. At the time of the first injury.
A. No, sir.
Q. How did you come to forbid him, then?
488 A. Having charge of the yard and knowing that he got hurt, it was my place to look after him and see that he didn't get into a place where I told him not to get.
Q. You may state how he got hurt the first time.
A. I didn't see him get hurt.
Q. Were you there at the time?
A. No, sir; I was there in the employ of the yard; I was not there; it was in the night.
Q. Was he helping Mr. Etzcorn?
A. No, sir.
Q. What business was he engaged in at the time he got hurt?
A. He was switching at the east end of the yard.
Q. East of 5th street?
A. Yes, sir.
489 Q. Where do you live?
A. Dakota Ter.
Q. Anybody else with you?
A. No, sir.
Q. Were you brought here by the company?

STEWART: He came here for the company by letter and telegram.

Q. You came on a pass?
A. Yes, sir.

STEWART: I object to it as irrelevant and immaterial.

Q. Did you go where this place was that morning?
A. Yes, sir.
Q. You went to 5th-street crossing?
A. Yes, sir.
Q. Did you notice the plank?
A. Yes, sir; noticed the plank on the crossing.

Q. Saw no hole?
A. Don't recollect seeing any hole.
Q. At all?
A. No, sir.
490 Q. Do you recollect of seeing some appearance of dragging?
A. Yes, sir; saw the marks where he was dragged.
Q. Did you hear anybody speak of a hole at all?
A. I don't remember hearing anything about it.
Q. What time did you get there in the morning?
A. About six o'clock.
Q. Some of the workmen were there then, were they not?
A. The night yard men were there.
Q. Was Mr. Etzcorn there?
A. He was there in the yard around there.
Q. Back and forth?
A. Yes, sir.
Q. You were back and forth there nearly all day?
A. I was there in the yard all day.
Q. You heard this accident talked of?
A. Yes, sir.
491 Q. Did you endeavor to find where he was hurt?
A. I went there and looked over the ground where he was hurt.
Q. Looked over all that planking?
A. Yes, sir.
Q. And didn't see any hole at all?
A. I didn't see any such hole in the plank as that there.
Q. But you saw appearances of dragging?
A. Saw the marks where he was dragged.
Q. Can you now recollect about this appearance of dragging at this distance of time?
A. Yes; I can remember where he was dragged.
Q. Do you mean to say that you can swear positive that there was no appearance of dragging further east than you stated?
492 A. Not any further east than what I spoke of—6 or 8 feet from the east end, I suppose.
Q. Did you go back to the east end to see?
A. Yes, sir.
Q. To the east end of the plank?
A. Yes, sir; looked it all over as a man would.
Q. If there had been a hole like that would you have seen it?
A. I would have been pretty apt to have seen it.
Q. You didn't notice any appearance of dragging at the east end of the plank?
A. No, sir.
Q. Nobody spoke to you about any hole there?
A. No, sir.
Q. Did you hear about any hole there after?
A. No, sir; I don't remember anything about it.
493 Q. You can see that hole there, can you?
A. Yes, sir.

Q. Do you think you could have seen it that morning if there had been such a hole there?
A. I might have seen it.

Redirect by Mr. STEWART:

Q. Did you look at the brake-beam of this M. C. car 520 on the west end?
A. Yes, sir.
Q. Did you discover any marks or anything peculiar about that?
A. About the brake?
Q. About the beam or the bolts, or anything there.
A. I saw some threads out of his overalls at the bottom there and, I think, a little blood on the brake-shoe—beam-brake shoe, rather.
Q. Pieces of flesh?
494 A. Some, I should say, flesh, and some threads out of the overalls.
Q. Where were they?
A. They were right on the brake-shoe—brake-hanger and brake-shoe.
Q. Bolts?
A. On the bolt heads that run through the cast-iron shoe.
COURT: The brake-shoe is the part that fits up against the wheel?
A. Yes, sir; iron part that fits up on to the wheel.
Q. You say that when you were not there Etzcorn had charge of the yard?
A. Yes, sir.
Q. Had he any power to hire or discharge any man in the yard?
A. No, sir.

COOLIDGE: We object to that as immaterial.
COURT: I don't see any relevancy.

(Defendant excepts.)

495 Q. Had Mr. Etzcorn the power to discharge Mr. Gardener?

COOLIDGE: We don't consider the question really relevant, but we will withdraw our objection.

Q. What is the answer? Had he power to hire or discharge?
A. No, sir, he hadn't.
Q. Had Etzcorn the power or right to order Mr. Gardener to do things contrary to your orders?

COOLIDGE: We object. He has not confined it to the time we did.
COURT: Is there any evidence here that Mr. Etzcorn had the power to take a man who was switching and put him to coupling cars?
COOLIDGE: Yes, sir; Mr. Etzcorn himself.
COURT: I think he may answer that.
COOLIDGE: We think the question is not specific enough.
COURT: He may answer.

496 Plaintiff excepts.

A. It is kind of a queer question for me to answer. As to his having charge of my place, he might order this man to do it, not knowing what my orders was; but I don't think he would order him to do this work if he knew I had forbid him doing it.

And on said trial, October 16th, 1888, said counsel for the defendant, further to maintain and prove the said issue on his part, called as witnesses Adolphus Waltz and George Johnson, which two witnesses had never been called or testified in the aforesaid suit in the State court, and the testimony in full of said two witnesses is as follows:

ADOLPHUS WALTZ, being sworn as a witness on behalf of the defense, testified as follows:

Direct examination by Mr. STEWART:

Q. Mr. Walsh, where do you live?
497 A. St. Thomas, Canada.
Q. What is your age?
A. 32.
Q. What is your business?
A. Engineer.
Q. What kind of an engineer?
A. Running locomotive.
Q. How long have you been a locomotive engineer?
A. Going on 9 years.
Q. In whose employ are you?
A. The Michigan Central.
Q. How long have you worked for the Michigan Central Railroad Company?
A. Well, it has been 14 or 16 years altogether.
Q. What do you mean by "going on 9 years" that you have been an engineer?
A. Well, I have run an engine that long.
Q. As engineer?
A. Yes, sir.
Mr. UHL: Do you mean between eight and nine years?
A. Yes, sir.
Q. Before you became engineer what did you do?
A. I fired, run a switch-engine, horseler.
Q. Running switch-engine and what?
A. As horseler, taking engines in and out from the round-house.
Q. When did you first enter the employ of the company as fireman?
A. In 1872, I think.
Q. Where?
A. At Kalamazoo.
Q. How long did you remain there?
A. A couple of years; somewheres near that.
498 Q. Where did you go from there?

A. Then I went on the South Haven railroad. I was firing there, I think.

Q. How long did you fire there?

A. Well, I couldn't say exactly how long it was.

Q. Well, where did you go to from there?

A. I went on the main line.

Q. Between what points?

A. Between Michigan City and Jackson.

Q. What did you do there?

A. Fired.

Q. How long did you continue to fire on that line?

A. Oh, I couldn't say how long I fired there—freight. I don't remember.

Q. What year were you given an engine in?

A. In 1879.

Q. As an engineer?

A. Yes, sir.

Q. Where was you at work with your engine?

A. On the Middle division.

Q. Whereabouts?

A. Between Jackson and Michigan City. I did run on the Saginaw road.

Q. What did you do the first month you were engineer?

A. Well, I run an extra. I run a switch a little.

Q. Where did you run the switch-engine?

A. In the Jackson yards.

Q. How long did you run that?

A. About seven months; somewheres along there.

499 Q. What amount of switching is done at Jackson compared with other points along the road?

A. Well, there is more switching done there than any other station between Jackson and Michigan City.

Q. You say you did switching there exclusively there for several months?

A. Yes.

Q. Well, after you quit that work where did you go—what engine did you take?

A. What engine?

Q. Well, whether it was a switch engine or a road engine?

A. After I quit that I ran an extra on the road. I run every engine that came my turn to.

Q. At what time did you make regular runs, beginning?

Q. I must have got this in—in 1881 some time.

Q. State whether or not, while you were firing and prior to the 16th of May, you had done switching in the Niles yard.

A. Yes, sir; I had.

Q. Were you familiar with the tracks and location of the ground there?

A. Yes, sir.

Q. What do I understand you to mean by "doing switching," so far as you were concerned?

A. Well, handling the cars—switching out cars and putting them on different tracks.

Q. With your engine?

A. Yes, sir.

Q. You were running the engine for that work?

A. Yes, sir.

Q. Were you acquainted with the switchmen and tenders at the Niles yard in May, 1882?

500 A. Well, yes. I was acquainted with the men that had charge of the engine.

Q. What engine did you take in 1881?

A. "424."

Q. What was she, a new one or an old one?

A. She was a new engine, sir; came here new from Schenectady works. Then she had been run about ten months and went into the shop for repairs and new flues and had just come out of the shop when I got her.

Q. That was your first through run on a regular?

A. Yes, sir.

Q. State whether or not you continued to use that engine for a period of time; and, if so, how long.

A. Well, I run the engine for three years.

Q. Between what points?

A. Well, I run her all over the Michigan Central road.

Q. What was her run?

A. Her run was between Jackson and Michigan City.

Q. You say you were acquainted with the Niles yard and the employees of the company who had her in charge?

A. Yes, sir.

Q. Who did you understand to have charge of the yard there at nights?

A. Mr. Etscorn.

Q. In May, 1882?

A. Etscorn.

Q. Do you know who his assistants were there with reference to making up trains and coupling and uncoupling cars?

A. No, sir; I don't know his name; I don't remember.

Q. Would you know it if you would hear it?

501 A. I might.

Q. Was it Walker?

A. Walker, I believe; that is the name.

Q. What do you think?

A. I think that is the name. I wouldn't be sure of it. I don't remember the man.

Q. Now, while running regular on this engine that you have spoken of, state whether or not you were in the habit of doing switching at the Niles yard with it.

A. Yes, sir.

Q. Who gave you directions as to what to do at that point?

A. Well, when I had through trains, the conductor; when I was doing the switching, the yard master.

Q. Who did you take orders from in the city of Niles?
A. The yard master.
Q. Well, who was that—give me his name—at night?
A. Etscorn.
Q. Do you remember of going into the Niles yard at midnight or early in the morning on the 16th of May, 1882?
A. Yes, sir.
Q. What engine had you then?
A. "424."
Q. What train did you pull in?
A. Number 8.
Q. What was she?
A. Evening express.
Q. Where did you take her?
A. To Decatur.
Q. How came you to take that train?
A. The engine that was on her blew out a cylinder head.
502 Q. Were you laying at Decatur at the time?
A. Yes, sir.
Q. With your train and engine, I suppose?
A. With the engine; just laying there.
Q. You got orders to hitch onto number 8——

Mr. BACON: Don't lead him.

WITNESS: Yes, sir.

Mr. STEWART: It is immaterial, anyhow. It is done to save time.

Q. And you carried tha- train to Niles?
A. Yes.

The COURT: Go over that as fast as you can to the work.

Q. Now, sir, after you got in Niles that morning what occurred?
A. What occurred?
Q. Yes.
A. Well, I had a hot box when I got there; broke out at Dowagiac. The conductor notified me that the engine was running hot. They had the switching al- ready when I got to Niles, and Etscorn asked me if my engine was all right. I told him no. He said, All right. "We have got to have the switching ready." Then I uncoupled my engine and backed up east behind the main line, they call it, and packed my engine. By that time the train had come. Mr. Etscorn came around and told us that we had this work to do and I went on *the* done the work.
Q. Which way did your engine head while you were doing that work?
A. It headed west.
503 Q. Which side of the engine were you on doing your work?
A. On the right-hand side.
Q. Who was your fireman at that time?
A. Johnson—George Johnson.

Q. Now, where did you go to get the cars to the switch?
A. Out of the freight-house.
Q. Do you know how many there were there?
A. Yes, sir.
Q. How many?
A. Five.
Q. From whom did you take your orders?
A. From Etscorn.
Q. Who moved those cars and switched them about?
A. Mr. Estcorn.
Q. Anybody else?
A. No, sir.
Q. Did you see Mr. Gardner there that morning?
A. No, sir.
Q. Do you know him?
A. Yes, sir.
Q. You knew him then?
A. I knew him then.
Q. Did you know what his duties were?
A. Yes, sir.
Q. What were they?
A. Switch-tender.
Q. Anything else?
A. Oh, giving the engine water, and drawing sand.
Q. Did Mr. Gardner come up to you that morning while you were in your engine and say to you that he was going to help the boys that morning, and to be careful?
A. No, sir.
Q. And, if so, when?
A. He did not, sir.
504 Q. Had you seen him there prior to the — at any time?
A. No, sir.
Q. And, if so, when?
A. I seen him just before this accident standing over by the water-tank on the north side of the track, throwing the switch, I think. I think he took down the switch-lamp.
Q. Do you know or had you been advised by any one that morning that he was going to assist you in any way about making up or switching those cars?
A. No, sir.
Q. Who did you understand was doing that work?
A. Etscorn.

Mr. BACON: Well, his understanding—there is no trouble about that.

Q. Well, who had talked to you about it that morning?
A. Etscorn was the only man that talked. He was the man I got my orders from. I didn't take them from anybody else.
Q. Did anybody else undertake to give you any that morning?
A. No, sir.

Q. Now, state, if you please, just what you did and how you did it that morning, after you hooked onto these five cars.

A. After we hooked onto the five cars we backed up from this switch at the road-crossing there.

Q. East or west?

505 A. East of it, the engine was, and the cars. Etscorn cut off one car and got onto the car and rode down; set the brake on it; climbed down the ladder; they checked me up after he got the car cut off; signalled me to back up again; I backed up—backed up east—and after I saw I was over the switch I stopped, and I saw him climb off the car and throw the switch down toward the freight-house and come up this way; by that time I reversed my engine to stop.

Q. Well, as you were going east after having thrown this one car off, or Mr. Etscorn, which way was you looking?

A. I was looking towards Mr. Etscorn.

Q. State whether or not at that time you saw Mr. Gardner.

A. That is the time I saw Mr. Gardner, too.

Q. Now, where was he?

A. He was over on the north side of the track.

Q. East or west from where you were?

A. It was west of me.

Q. Now, what drawed your attention away from Mr. Gardner, if anything?

A. Reversing my engine, I saw Mr. Gardner was away from me.

Q. What was he doing when you last saw him, if anything?

A. He was going towards—over the crossing.

Q. Well, in what direction—towards you or away from you?

A. He was going south.

506 Q. Well, would that be towards you—towards your train?

A. No, sir; he would have to come east towards me.

Q. At this time, when you saw him, had you in any way been informed or did you know that he was going to go between the cars for any purpose?

A. No, sir.

Q. For who was you looking out for?

A. For Etscorn.

Q. Now, state just what you did in your engine when you turned your face and took hold of your lever after having seen Mr. Gardner, as you have described.

A. After I saw Mr. Gardner I got the signal just before that to stop, and when I saw I was over the switch, while I reversed my engine, he must have went in between the cars.

Q. Well, did you see?

A. I didn't see him going there; I seen him about two rods from there.

Q. That was the last you did see of him?

A. That was the last I saw.

Q. Did you have any information or did you know that he was going between the cars?

A. No, sir.

Q. Or know that he was going to assist that morning?

A. No, sir.

Q. Well, what did you do when you took hold of your lever.

A. I reversed my engine and looked out and got a signal to go ahead again.

Q. From who?

A. Etscorn. Just as I was reaching for my throttle to give
507 my engine steam; it was in motion then; there was steam on to throw her ahead, being down hill there. Just as I — reaching for my throttle to give the engine steam I heard screaming, and I looked out and I saw Etscorn swing me up. I stepped to the left side and asked the fi-eman, "Can you see anything on that side?" He didn't see anything. "Well," I says, "there must by somebody hurt."

Q. Well, what did you then do?

A. I stopped my engine and got down and saw that the man was hurt.

Q. Well, did you reverse her again?

A. In throwing her back I gave her steam to stop quick. She would go back herself if I throwed her ahead again. She would run ahead with the slack of the cars.

Q. Now, at this time, after you got down from throwing off the car—the first car—or Mr. Etscorn—I understood you to say you got in position where you were ready to go back again to throw the other car?

A. Yes, sir.

Q. Where was that to be taken, do you know?

A. Where was what?

Q. Where was that car that was next to be taken off of the first car to be placed?

A. The first car or the second car?

Q. The second car.

A. I think it was to be throwed in the freight-house.

Q. Now, when you throwed your lever back, did you put on any steam at all?

A. I had to work steam when——

508 Q. (Interrupting.) When you went east?

A. Yes, sir.

Q. Now, when you got east and wanted to back up again too throw the second car in the freight-house, did you throw any steam into your cylinders?

A. I had to go ahead again.

Q. See if you understand me.

The COURT: You do not use quite the correct language.

Q. After you had gone east, after having thrown out the first car and got in a position where the switch could be turned so as to go west again, did you do anything more than throw your -ngine over?

A. After I backed up?

Q. Had you backed up and got ready to move to the west?

A. Did I do anything but throw my engine over? I didn't.
Q. Did you let any steam in the cylinder at all?
A. Yes, sir.
Q. At that time?
A. Well, it takes a minute or so for the steam to get out.
Q. I say, did you let any in at that time?
A. No, sir; I didn't let any in. I thought you asked me if there was steam in there.

509 Q. Now, what is the effect upon the engine of the steam already in the cylinder without letting any more in after you have reversed it in that way as to moving the engine—what is the effect of the steam already there?

A. Well, there is most generally enough steam there to start with if you don't open the cylinder cocks.
Q. Well, how far would she then run in the position she was that morning without steam—that is, without letting any more steam in there—after you had reversed her, if you hadn't stopped her?
A. Well, being down grade there, I should think it would run away onto the bridge if the switch being made.
Q. About how far had she gone in a westerly direction before you heard this screaming?
A. Well, I would say four or five feet, somewheres along there.
Q. Could you tell about how many revolutions your drivers made?
A. No. I don't think it hardly made one.
Q. What was the size of the drivers?
A. Five feet, I think.
Q. When did you first learn who it was that had been injured?
A. After I got down on the ground and saw who it was.
Q. Did you haul your engine and cars east over the track after the accident?
A. Yes, sir.
Q. Over the highway?
A. Yes; it was over the highway; just at the edge of the highway-crossing.
Q. Did you go back to the crossing to see who was injured?
A. No, sir.

510 Q. Did you that morning?
A. Did I?
Q. Yes.
A. I looked at the crossing; after I got through my work I went to breakfast.
Q. Did you make any examination of the condition of the planking at that point?
A. No, sir; I saw there was a hole in the plank.
Q. Whereabouts, at the end; at the east end?
A. Yes.
Q. How large was it?
A. Well, I don't know. It would measure about—well, I couldn't say how large it was, for I don't know.
Q. Well, did you see something on the crossing that indicated something had been dragged there?

A. Yes, sir.

Q. How far from the east end of the plank did the first indications begin of that dragging?

A. Well, I think about from four to five feet, I should think.

Q. (Showing witness paper.) Now, Mr. Walsh, the switch that these cars were being put on—which was the switch that the car was being put on, which was the switch that the car was being operated over that you were throwing out?

A. Which was the switch?

Q. Yes. Do you recognize that as the location of the three tracks at the 5th-street crossing in Niles?

A. I don't remember.

511 Q. Which track were you on?

A. I was on a straight track.

Q. Well, this is the south track. I suppose the track from the freight-house was back here (indicating)?

A. Yes, sir.

Q. Now, the sw-tch that these cars were being thrown down—was it east or west of the 5th-street crossing?

A. The switch, I think, was west of the 5th-street crossing.

Q. Was it the switch that threw the cars into the freight-house?

A. Yes, sir.

Q. And it was west of the 5th-street crossing?

A. Yes, sir.

(By the COURT:)

Q. The track you were operating on was on the north of the three tracks that switch onto the south track?

A. Yes, sir.

The COURT: The jury understand that, do they? I have not called their attention to it because I was a little in doubt about it myself.

(The court here explained to the jury the positions of tracks, switches, etc.)

Q. Mr. Walsh, state whether or not engines that are used generally for switching purposes have air brakes.

A. No, sir; unless they handle passenger trains.

Q. Well, what is the object of having air brakes?

512 A. Well, I suppose so there will be no jar on the coaches.

Q. Are the tubes connected with the trucks of the coach and engine?

A. Yes, sir.

Q. Well, you switched in Jackson. Did they have any switch-engine there for freight cars with air brakes?

A. No, sir; not one—well, there was one down to the passenger-house.

Q. Well, I mean for freight cars. This was at the passenger-house

and was used for moving passenger cars; but I mean for exclusive freight-switching.

A. No, sir.

Q. Do you know of any practice along the line of the road—any place along the line of the road that they have engines thus equipped for freight cars?

A. No, sir.

Q. When the engines with air brakes was used for freight-switching state whether or not the air brakes were used at all for an engine with air brakes on it, its being used for freight-switching—do they pay any attention to the use of the air brakes in the switching of freight cars?

A. Well, sometimes they might and sometimes they wouldn't. It is just as the engineer feels about it.

Q. Are they of any practical use or benefit?

A. Well, just a trifle—just on the tank.

Q. I mean in switching.

A. In switching they just hold the engine—just the tank.

513 Q. Do they connect them in any way with the cars?

A. No, sir.

Cross-examination by Mr. BACON:

Q. Mr. Walsh, in what year were you "set up"?

A. What year?

Q. Yes, sir.

A. In 1879, I think.

Q. Haven't you stated since you have been here that it was in 1880?

A. No, sir.

Q. What time in 1879 did this happen?

A. What time? I don't remember. I couldn't say. I was "set up" and then put back to firing again until they needed me. Then I run a switch-engine. My time wasn't counted in for it until I went on the road. I went on the road in 1880; some time along there.

Q. Then you had been set back?

A. I wasn't set back no more than watch for my turn. When business got slack we had to go back firing and do what there is to do.

Q. How long intervened between the time that you were authorized to work an engine, in 1879, until you began to work?

A. In 1880——

Q. As near as you can recollect?

A. I don't remember.

Q. As near as you can remember, that is all.

A. Well, I couldn't say because I don't remember. I dont

514 so many things. I horselered and done everything that there was to do.

Q. Well, can you remember when you commenced to run an engine on the Michigan Central railroad and run it regular, continued to run it—what year that was in?

A. Yes, sir.
Q. What year was it?
A. In 1871.
Q. When?
A. 1871 or 1881.
Q. 1881?
A. 1881 I mean.
Q. You never run a- engine regularly on the Michigan Central railroad until 1881, did you?
A. No, sir.
Q. What?
A. No, sir.
Q. Then, at the time *of* this accident happened, in May, 1882, you were what was called an "apprentice" engineer, weren't you?
A. Yes, sir.
Q. You remember of hearing Mr. Gardner scream at the time he was hurt?
A. Yes, sir.
Q. Now, sir, where was Etscorn when you saw him last before you heard Gardner scream?
A. I saw him last?
Q. Yes, sir.
A. He was throwing the switch.
Q. How far from where Gardner was when he was hurt?
A. Oh, he was down there at the second crossing by the side of the depot.
Q. How many rods, as near as you can tell, from where
515 Gardner was hurt was Etscorn when you last saw him before Gardner was hurt?
A. He must have been ten or twelve rods.
Q. Didn't you say he was clear down by the station building?
A. He was down by the next road crossing.
Q. You don't know how far it is?
A. 4th street, that is.
Q. How far was it?
A. I don't know what the name of the street is—4th street.
Q. It is one street west, isn't it?
A. Yes, sir.
Q. Well, what was he doing when you last saw him before Gardner was hurt?
A. He was going across the track to turn the switch.
Q. Etscorn was?
A. Yes, sir.
Q. Was your engine then standing still or in motion?
A. It was in motion—backing.
Q. Going which way, east or west?
A. Going east.
Q. What made you stop it?
A. When I saw I was over the switch I stopped.
Q. Stopped of your own judgment?
A. Yes, sir.

Q. Now, sir, you didn't see Etscorn again until after Gardner was hurt, did you?

A. Well, I saw about the same time as I put my head out; I heard the screaming and I put my head out and saw Etscorn swinging me up.

Q. You was in motion, then?

516 A. Just reversed the engine to go ahead.

Q. To go which way—west?

A. Yes, sir.

Q. What made you go west—what made you start up to go west? You had come to a standstill coming east. Now, what made you start up to go west?

A. Because I knew I had to go west in order to do the switching.

Q. You knew there was a car to be uncoupled, then, did you?

A. Yes.

Q. How did you know that?

A. Because he told me.

Q. Who told you?

A. Etscorn.

Q. Did he tell you before you last saw him?

A. Yes, sir.

Q. What did he tell you?

A. He told me that the switching was to be done there.

Q. You knew that meant uncoupling?

A. Yes, sir.

Q. You knew that included uncoupling the car?

(No response.)

Q. Well, we will take it for granted that——

Mr. UHL: He says he did.

Q. Well, if Etscorn was down to 4th street—clear down there a block off—how did you expect he was going to do the uncoupling?

A. He said he was coming up to do it.

Q. You thought he would have time to get there?

A. Yes, sir; I didn't look for anybody else to do it there.

517 Q. When you last saw him, before Gardner was hurt, Etscorn was down at 4th street and you were east of 5th street. How far east of 5th street were you when you was there at that standstill?

A. About four car lengths and the length of the engine.

Q. About what?

A. About four car lengths.

Q. How many cars did you have there?

A. Four, and the length of the engine, too.

Q. You knew one was to be uncoupled to go into the freight-house?

A. Yes, sir.

Q. Then you started up to go west for the purpose of having that fourth car uncoupled at that time?

A. Yes.

Q. And you did it without any signal—of your own judgment?

A. Yes, sir.

Q. And then, at that time, when you was in a motion to go west, you saw Mr. Gardner going towards that train, didn't you?

A. I saw him going over the crossing.

Q. He was going towards your train, wasn't he?

A. Yes; he was going towards it.

Q. Who was the nearest, Mr. Gardner or Mr. Etscorn?

A. Mr. Gardner was nearest.

Q. He was about five times as near as Etscorn, wasn't he?

A. Yes, sir.

Q. And you supposed Etscorn was going to be back in time to uncouple that car, did you?

A. That is what I did, sir.

518 Q. You had no idea of anybody else being there to uncouple it?

A. No, sir.

Q. You supposed it was to be uncoupled just about where it was uncoupled, didn't you?

A. No, sir.

Q. It was uncoupled, then, without your knowing it?

A. Yes; it was uncoupled unbeknown to me.

Q. You were looking at Etscorn at the time Gardner was hurt, then, were you?

A. Well, no. At the time he was hurt I had my head inside of the cab, reversing the engine. He must have got in there while I was backing up—before I came to a stop to go ahead again. I never saw the man go in at all; if I did——

Q. (Interrupting.) You never saw Mr. Gardner from the time you saw him coming towards your train until after he was hurt, did you?

A. No, sir.

Q. You didn't have your head out between those times, did you—from the time you saw him coming towards your train, just before he was hurt, until you heard him scream—you didn't have your head out of the cab at all, did you?

A. No, sir; I had just reversed my engine. You have to put your head in to reverse the engine.

Q. You were started up slowly, I suppose?

A. Well, my engine——

Q. (Interrupting.) I mean going west. You started to go west from that hault east. Of course you started up very slowly?

A. Yes.

519 Q. About how slow? Just tell us.

A. About two—about a mile an hour, or two miles an hour.

Q. When you saw Etscorn last before Gardner was hurt, was Etscorn on top of a car?

A. No, sir.

Q. He wasn't?

A. No, sir.

Q. Did you see him on top of a car shortly before Gardner was hurt?
A. Yes, sir.
Q. Had he got down off of the top of the car before Gardner was hurt?
A. Yes, sir.
Q. He had?
A. Yes, sir.
Q. Before Gardner screamed Etscorn was off of the top of the car?
A. Yes, sir.
Q. Which way was he going?
A. He was coming from the switch.
Q. South, north, east, or west?
A. South.
Q. Was there a switch there for him to attend to?
A. Yes, sir.
Q. Now, you supposed he was going to attend to that switch, did you?
A. Yes, sir; to attend that switch and come up and pull a pin.

Redirect examination by Mr. STEWART:

Q. You were asked by counsel whether or not you started west again slow. What do you mean by that—starting west again at the time Gardner was hurt?
A. What did I mean by that?
520 Q. Yes. Your going back west, did you give your engine any steam to go with?
A. No, sir.
Q. State what you meant by that.
A. She was in the head motion; it is down hill there and I knew I had to go ahead again.
Q. Well, what was it that started her ahead?
A. Well, it was the steam that was in the cylinder started the engine ahead.
Q. Well, did you give her any other assistence than that?
A. No, sir.
Q. Then she only had force to go back west with as there was steam remaining in the cylinders?
A. Yes, sir.
Q. After you had throwed her forward?
A. Yes, sir.

GEORGE JOHNSON, being sworn as a witness on behalf of the defence, testified as follows:

Direct examination by Mr. STEWART:

Q. Where do you reside, Mr. Johnson?
A. Jackson.
Q. What is your age?
A. 33.

Q. What is your business?
A. I am a farmer now.
521 Q. What was your business in 1882, May?
A. Fireman.
Q. On what?
A. On the Michigan Central railroad.
Q. What engine?
A. "224."
Q. What engineer were you with?
A. Mr. Walsh.
Q. How long had you been firing at that time?
A. I commenced firing in 1880.
Q. When did you take your position as fireman with Mr. Walsh?
A. About 1881.
Q. What engine was this 224, old or a new one?
A. New engine.
Q. Do you know where it was built?
A. I don't remember where it was built.
Q. Schenectady?
A. What?
Q. Do you know whether it was a Schenectady engine or not—a Schenectady engine?

The COURT: Do I understand there is any criticism made on the quality of the engine?
Mr. BACON: Only it had no air brakes. That is admitted.

Q. Well, were you with him on his run on the 16th of May, with Mr. Walsh, 1882?
A. I was with him at the time Mr. Gardner got hurt.
Q. From what—what immediate point did you run into Niles that morning from?
A. From Decatur, I believe.
Q. State whether or not you stopped at Niles.
A. Yes, sir.
522 Q. With your engine?
A. We stopped at Niles.
Q. Had you done switching with Mr. Walsh in that yard before?
A. Yes, sir.
Q. Acquainted with many of the tracks and the ground there?
A. Well, some.
Q. Did you know the men employed there permanently at that place?
A. Well, I knew some of them.
Q. Well, did you know them by name or sight?
A. I knew them by sight mostly.
Q. What ones did you know?
A. I knew Mr. Gardner by sight; he gave us sand and water.
Q. Well, did you know Mr. Etscorn?
A. No; I knew him by sight; that is all.
Q. You knew what capacity he held there, did you?
A. Well, I supposed he was yard master, yard boss.

Q. Now, did you see Mr. Gardner there that morning shortly after you got into the depot with the train?

A. Yes, sir.

Q. What train did you go in with?

A. I got in on the passenger, double-header, number 8, I think; the same train that Mr. Walsh met east.

Q. Now, after you got in the Niles yard that morning did you see Mr. Gardner at all?

A. Yes, sir.

Q. Where first and under what circumstances and where did you see him?

A. Well, when we was cut loose from that train he came and jumped on the engine; as he jumped he slipped like, and he struck on the side of the tank. I says, "Look out or you will get
523 run over." He says, "Never mind me." I don't remember of seeing him again until he was hurt.

Q. How far did he ride with you?

A. Well, he didn't ride but a few rods down towards the depot.

Q. Well, when next did you see him after that?

A. I don't remember of seeing him until after he was hurt; after that.

Q. Did you pack your box that morning—hot box?

A. Yes, sir.

Q. Where did you first see Mr. Etscorn that morning to get your orders from?

A. Well, I seen him at the time he came and asked about the engine running hot.

Q. Did you hear him instruct Mr. Walsh what he wanted done?

A. Yes, sir.

Q. Was anything said by Mr. Etscorn about Mr. Gardner assisting you that morning?

A. Not that I heard.

Q. Did Mr. Gardner say anything about assisting in coupling or uncoupling cars that morning?

A. No, sir.

Q. Did you know that he was going to do it?

A. No, sir.

Q. Now, where did you get the five cars from that were finally hooked onto switch?

A. At the freight-house, if I am not mistaken.

Q. Who was handling the cars at that time, setting the brakes and coupling and uncoupling?

A. Mr. Etscorn.

524 Q. Do you remember of throwing off the one of the five and taking it down there to the west end?

A. I don't remember; that wasn't my business; my business was mostly ringing the bell along the crossings; I knew we backed up.

Q. After you hooked onto these cars, did you at any time become aware of an accident having happened?

A. Well, yes; after we backed up at the crossing there.

Q. Go on and describe, now, just what took place and how it took place.

A. Well, the way it took place, as near as I have said, we backed up to that crossing away east of the crossing; we stopped, and he throwed his engine in ahead; of course she would start ahead; just as he started ahead he heard the screaming and hollering; just as he threw the engine in back he jumped over to my side to see if there was anybody on my side hurt; I got down and looked out the window and got down and went right down where Mr. Gardner was.

Q. What did you find there?

A. I found Mr. Gardner.

Q. Whereabouts on the crossing was he then?

A. Well, I should think he was about ten or twelve feet from the east end of the crossing.

Q. At that time?

A. Yes, sir.

Q. Did you know that he was—that he had gone between the cars?

525 A. No, sir; he wasn't on my side; I couldn't see him.

Q. You hadn't seen him at all?

A. No, sir.

Cross-examination by Mr. BACON:

Q. Where was this—where Mr. Gardner gets on the engine? Where were you when Gardner stepped his foot on your step and rode a little ways with you?

A. (Indicating on map.) It was down here near the station, west of this crossing.

Q. Near the station?

A. Near the station and west of the crossing. About where we stopped the train.

Q. About how far west of the crossing, as near as you can remember—about how many rods?

A. Well, I couldn't say.

Q. Which way was you going?

A. We was going west.

Q. About how far did he ride with you?

A. Well, not very far; not over three or four rods, I don't believe.

Q. Which way did he go—east or west?

A. We was moving west at the time he stepped on.

Q. How fast was the engine going?

A. Probaboy two or three miles an hour—two miles an hour.

Q. It is very customary for a man to step on and off going at that rate?

A. Yes, sir.

Q. Nothing wrong about that, that you heard of?

526 Mr. STEWART: Wait a moment. I object to it.

Mr. BACON: I will withdraw it, then.

Q. How long before this accident was that?
A. Well, it was probably an hour. We packed the box after that.
Q. He hadn't got hurt in that transaction at all, had he?
A. No, I don't know as he got hurt; he slipped and I told him——
Q. (Interrupting.) He didn't fall, did he, either?
A. He didn't fall; no.
Q. He had his hand on something?
A. He put his hand on the tank.
Q. His hand didn't slip, did it?
A. His foot slipped.
Q. His foot slipped, and his hand held him fast?
A. It held him; yes, sir.
Q. His hand was on a part of your engine there?
A. Yes, sir; on the tank.
Q. On the——
A. (Interrupting.) On the tank handle.
Q. On the handle?
A. Yes, sir; there are handles on that tank.
Q. Your place was to look out on the south side just before this accident?
A. Yes, sir.
Q. The engineer's was to look out on the north side?
A. Yes, sir.
Q. That is the duty of each of you?
A. Yes, sir.
Q. To keep a lookout?
A. Yes, sir.

527 The COURT: Does this witness know whether the engine was backed to the east immediately after the screaming was heard?

WITNESS: Yes, sir; as quick as he heard the noise he throwed the engine back; he started back, and the steam, of course, throwed it back.

Mr. STEWART: He testified so in the first instance.

(By Mr. BACON:)

Q. How far east did it go before it stopped at that time?
A. Well, it backed up east of the crossing.
Q. About how far—how many car lengths?
A. Oh, three or four car lengths off of the crossing.
Q. Before you came to a sstop?
A. Yes.
Q. Did the screams continue while you were backing—more than one scream?
A. I don't know as to that; we heard the screaming.
Q. You heard the screaming?
A. Yes, sir.

Mr. STEWART: He didn't say he heard it continuously.

Q. Did you hear more than one scream?
A. I heard him scream.
Q. More than once, or not?
A. No; I don't know as I did more than once.

528 GEORGE JOHNSON, being recalled for further examination by Mr. STEWART, testified as follows:

Q. Mr. Johnson, did Mr. Gardner come up to the engine that morning and tell you or the engineer in your presence that he was going to assist the boys that morning in switching and making up the trains, and that he want-d them to be careful in switchin-? *ing*?
A. No, sir.

Recross-examination:

Q. You didn't hear him address anything to anybody that morning, did you?
A. No, sir.
Q. What?
A. No, sir.
Q. You didn't hear him speak to anybody on the car where you were that morning?
A. No more than I told him when he jumped up on the side where I was.
Q. That *n* was an hour before the accident?
A. Yes, sir.

529 And on said trial in the Federal court October 16, 1888, the defendant produced as witnesses William B. Stillson, M. D. Gregg, Joseph H. De Rosier, George W. Doliver, and H. F. Serrine, witnesses named in said Exhibits A and H, and their testimony was the same in substance and effect as is set forth in said printed record, Exhibit H, except that when the witness George W. Doliver was testifying the counsel for the plaintiff asked him the following question on cross-examination:

Q. Mr. Doliver, you speak of different departments there. Mr. Batchelor's department was a different department from yours, wasn't it?

The witness answered: "Yes, sir."

Said counsel continues:

"What was his department?"

Whereupon Mr. N. H. Stewart, counsel for the defendant, said:

"That already appears; what is the use of taking up time?"

The counsel for the plaintiff said:

"Well, then"—and said counsel for the defendant, interrupting, said: "It is conceded."

Said counsel for the plaintiff continued, "that the departments were different." To which said counsel for the defendant replied:

"Why, certainly."

530 And on said trial October 16th, 1888, said defendant's counsel gave in evidence a copy of the printed rules of defendant, dated March 28th, 1882, and in force May 16th, 1882, being

the same mentioned by Frederick Gardner in his testimony; and from said printed rules said counsel read in evidence rules 6 and 44, copies of which rules are set forth in Exhibit "E," hereto annexed.

And from said printed rules said counsel for the plaintiff read in evidence the last rule, being numbered 159 and printed in capitals, as follows:

"ALWAYS TAKE THE SAFE SIDE IN CASES OF THE LEAST UNCERTAINTY."

And on said trial said counsel for the defendant produced in evidence the printed rules of the defendant issued in November, 1887, being the same mentioned in the testimony of Frederick Gardner, and from said rules were read in evidence those of like effect as said rules 6, 44, and 159.

The rules aforesaid, other than said rules 6, 44, and 159, being of no importance in this case, were not referred to, but certain general introductory matter published and circulated with said rules was, on said trial, October 16th, 1888, read in evidence by said counsel for the defendant, and a copy of said introductory matter is set forth in the first fourteen lines of Exhibit "E," hereto annexed.

And on said trial, October 16, 1888, said counsel for the defendant gave in evidence the aforesaid printed record, Exhibit "H;" the aforesaid copy of the opinion of the supreme court of Michigan, Exhibit "I," and also a certified copy of the judgment in the State court for the reversal of which said opinion was rendered, which copy is hereto annexed and marked Exhibit "F;" and it was agreed by the parties, by their respective attorneys, that on filing said opinion the judgment of the supreme court was entered
531 in the usual form to reverse said judgment set forth in said Exhibit "F" and granting a new trial in said suit in said State court.

And on said trial, October 16th, 1888, said counsel for the defendant further offered in evidence a certified copy of the judgment of nonsuit in said State court in said suit therein, a copy of which judgment is hereto annexed and marked Exhibit "G."

And on said trial, October 16th, 1888, said counsel for the defendant further gave in evidence a certain map, a copy of which is as follows, which map shows the crossing where the plaintiff received his injury as it purports:

(Here follows map marked p. 532.)

533 And on said trial, Oct. 16, 1888, in the Federal court it fully appeared and the parties, by their counsel, agreed in open court that all the contents of the stenographer's report of the trial in Berrien circuit court, which is said Exhibit "A," were in substance and effect sufficiently and correctly set forth in the aforesaid printed record, which is Exhibit "H."

And thereupon both parties rested.

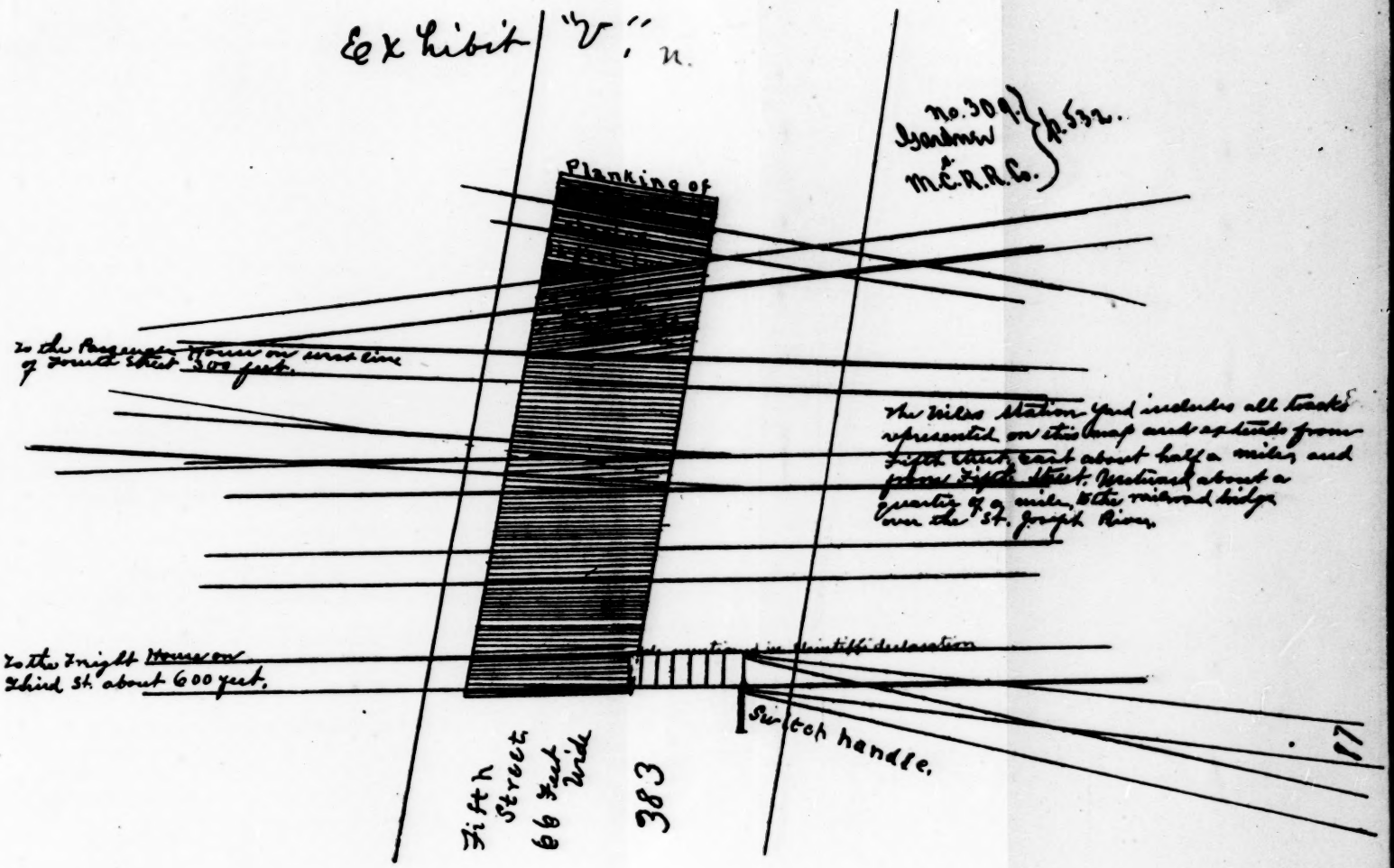


Exhibit "V".
No. 309. Lyonsdale & M.C.R.R.Co. } P. 532.
Planking of
to the Passenger House on west line of Fourth Street 300 feet.
the Niles Station Yard includes all tracks represented on this map and extends from Fifth Street east about half a mile, and from Fifth Street Westward about a quarter of a mile to the railroad bridge over the St. Joseph River.
to the Freight House on Third St. about 600 feet.
Switch handle.
Fifth Street 66 feet wide
383
177

Whereupon the plaintiff's counsel caused to be filed and presented to the court a writing, a copy of which is here next following, the words in parentheses being written by the presiding judge, and exceptions were duly taken as severally appears.

534 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

FREDERICK GARDNER, Plaintiff,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Defendant.

The said plaintiff, Frederick Gardner, comes, by Orville W. Coolidge and Edward Bacon, his attorneys, and requests the court now here to charge the jury and instruct them according to the following propositions.

Dated October 16th, A. D. 1888.

(Signed) ORVILLE W. COOLIDGE AND EDWARD BACON,
Attorneys for Plaintiff.

I.

Under the issue joined in this suit and under the evidence admitted and given on this trial the plaintiff is entitled to have the jury weigh and consider evidence.

(Refused.)

To such refusal the plaintiff, by his counsel, duly excepted.

II.

The plaintiff is entitled to the benefit and effect of all legal
535 evidence admitted and given on his behalf before the jury.

(" Refused.")

To such refusal by said presiding judge the plaintiff, by his counsel, duly excepted.

III.

It is not true that the plaintiff is on this trial to be deprived of the benefit and effect of any legal evidence merely because the same evidence was in another suit in the State court used to maintain and prove an issue of fact on behalf of the plaintiff against opposing evidence on behalf of the Michigan Central Railroad Company.

(" Refused.")

To such refusal by said judge the plaintiff, by his counsel, duly excepted.

IV.

There is in this controversy no final judgment to raise implications or presumptions, and no opinion of the supreme court of

Michigan can be the law of this case any further than such opinion does with sufficient certainty declare matter of law.

("Refused.")

To such refusal of said judge the plaintiff, by his counsel, duly excepted.

V.

No opinion of the supreme court of Michigan can be the law of this case to determine any question of fact or to establish any matter of fact.

("Refused.")

To such refusal by said judge the plaintiff, by his counsel, duly excepted.

536 VI.

There is no law of this case or of any other case to deprive the plaintiff of the benefit of any legal evidence tending to prove his cause of action.

("Refused.")

To such refusal by said judge the plaintiff, by his counsel, duly excepted.

VII.

If the jury find that the defendant was guilty of negligence in relation to the hole in the planking of its railroad crossing on Fifth street in the city of Niles, and that such negligence directly and materially contributed to the plaintiff's injuries, as alleged in his declaration, then under the evidence on this trial no negligence by any fellow-servant does make any valid defense herein.

("Refused.")

To such refusal by the said judge the plaintiff, by his counsel, duly excepted.

VIII.

Under the evidence in this suit no negligence by any employé or employés of the defendant other than the plaintiff is sufficient in law to be a successful defense herein.

("Refused.")

To such refusal by said judge the plaintiff, by his counsel, duly excepted.

IX.

If the jury find that the plaintiff at the time he received his injury was obeying orders which took him from his ordinary employment for which he was engaged and placed him in a different and more hazardous one by those of the defendant's agents or
537 servants having him under their control and in the course of such hazardous employment he was injured, the defendant would be liable to respond therefor if the plaintiff himself was free from blame or carelessness contributing to bring about the in-

jury, even if his injuries did result from the negligence or want of care of any alleged fellow-servant.

("Refused.")

To such refusal of said judge the plaintiff, by his counsel, duly excepted.

X.

If the jury find that at the time and place the plaintiff received his injuries it was practically impossible to comply with any rule of the defendant purporting to prohibit entering between cars in motion to couple or uncouple them, then under the evidence in this case no non-compliance with such rule at said time and place constitute any valid defense here.

(Refused.)

To such refusal of said judge the plaintiff, by his counsel, duly excepted.

XI.

If the jury find that along the entire line of the Michigan Central railroad, extending from the city of Jackson, in the State of Michigan, through the city of Niles, in said State, to Michigan City, in the State of Indiana, throughout at least five years next before the 16th day of May, 1882, the uncoupling of cars in the defendant's continual operation of its said railroad was generally and necessarily done by hand and by having an employé enter between cars in motion, and if the jury further find that the plaintiff in entering between cars to uncouple them on said day in said yard was doing that which was reasonable and necessary according to the usual course of the defendant's business in operating its railroad, then the defendant has no valid defense on this trial merely because the plaintiff did so enter between cars in motion to uncouple them.

538

(Refused.)

To such refusal of said judge the plaintiff, by his counsel, duly excepted.

XII.

If the jury find that for a long time next before May 16th, 1882, the defendant had been continually operating its railroad through its Niles station yard in general and necessary disregard of any rule forbidding employés to enter between cars in motion to uncouple them, and if the jury further find that the plaintiff in entering between cars in motion at the time he received his injuries was doing no more than was reasonably necessary to uncouple the cars according to the usual course of business, then it does not follow that the plaintiff must be defeated in this suit.

(Refused.)

To such refusal of the said judge the plaintiff, by his counsel, duly excepted.

XIII.

If the jury find that after the publication and delivery of the printed rule given in evidence by the defendant the plaintiff received from those of the defendant's agents or servants having him under their control orders or instructions in effect to uncouple cars, then it is for the jury to find whether or not such orders or instructions meant that the uncoupling should be done in a reasonable and practicable manner and, according to the course of the defendant's business, generally deemed right and proper.

539

(Refused.)

To such refusal of said judge the plaintiff, by his counsel, duly excepted.

XIV.

The defendant is estopped from making a successful defense in this suit merely because the plaintiff disregarded a rule which the defendant itself had in operating its railroad been generally and reasonably disregarding.

(Refused.)

To such refusal of said judge the plaintiff, by his counsel, duly excepted.

XV.

If the jury find that the defendant's rule purporting to forbid the entering between cars in motion to uncouple them was, in the nature of things, such that it could not have been made for honest enforcement and must have been made with knowledge that it must be generally disregarded, as it was generally disregarded, and must have been made to be used in lawsuits as the defendant here seeks to use it, then the defendant ought to be held estopped from using such rule so as to defeat this plaintiff in this suit.

(Refused.)

To this refusal of said judge the plaintiff, by *by* his counsel, duly excepted.

XVI.

If the jury find that at the time the plaintiff received his injuries proper and sufficient motion westward was necessarily communicated to the eastward one of the two cars between which was the plaintiff, then the question whether or not the westward one of said two cars was necessarily set in motion is for the jury to decide.

540

(Refused. The necessity of passing upon these requests is superseded by the giving of the general directions to the jury.)

H. F. SEVERENS, *D. J.*

To this decision the plaintiff, by his counsel, duly excepted.

Filed Oct. 16, 1888.

And thereupon the said counsel for the defendant presented to the court a writing containing requests and marginal entries by the

judge showing what disposition was made thereof; and of said writing so presented and duly filed a copy is as follows:

541 The Circuit Court of the United States, Sixth Circuit and Western District of Michigan.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

Defendant's Requests.

(Given as modified.) 1. The testimony in this case shows that the defendant, through its printed rules, notified the plaintiff and forbade him going between the cars while in motion to couple or uncouple the same. A violation of this instruction by the plaintiff releives the defendant from any liability for injuries sustained by him while violating the same; and as against the positive instructions of defendant, forbidding employés going between cars while in motion to couple or uncouple them, what the common custom was as to violating this command by other employés does not assist the plaintiff any and furnishes no excuse for his violating the command, and the plaintiff, therefore, cannot recover (and the plaintiff, therefore, cannot recover unless by reason of some peculiar circumstances, such as the grade of the track at this section, it was necessary to operate otherwise than according to this rule, and this necessity and departure from the rule was recognized by the company in its practical operations there).

(Refused.) 2. There is no testimony in the case tending to show that plaintiff was ordered to go between the cars to couple or uncouple the same while in motion or otherwise on the morning of the accident or prior thereto.

542 (Refused.) 3. It is clearly established by the testimony in this case that the plaintiff here brought suit against the defendant in the circuit court for the county of Berrien for the same cause of action for which this suit is brought, and that the plaintiff recovered in his action in said Berrien circuit the sum of $5,000.00 and costs, and that judgment was entered upon that verdict; that thereafter that case was removed by writ of error into the supreme court of the State, and, after full argument before and consideration by that court, the case was reversed upon the ground that, under the record before that court and the undisputed facts, the plaintiff could not recover and sent the case back to the lower court for new trial; that thereafter the plaintiff submitted to a judgment of nonsuit and for costs in that court, and thereafter plaintiff brought his action in this court and, upon the present trial of this case, there has been no substantial change in the case from that shown by the record to have been before the State supreme court in

the case taken there from the Berrien circuit; that the case as made here is, in all substantial particulars, like the case made in the State court and without such change as would justify this court in applying any other or different rule of law to the facts than was applied by said State supreme court, and as that court held upon the — then before it, the plaintiff could not recover. The jury are instructed to find for the defendant.

543 (Refused.) 4. Under all the proofs in this case the plaintiff cannot recover.

5. This is the case of an employé of the Michigan Central Railroad Company who sues said company to recover for an injury sustained while coupling cars at Niles, Michigan, on the 16th day of May, 1882, by which injury he lost a leg while in the service of said company. It is a suit by a servant against his master for injuries sustained while in his master's employment.

6. The jury are instructed that a servant assumes all the risks of the employment, including the risks of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he had knowledge of their unfitness or negligence. (Given.)

7. Where a servant demands from his master compensation for an injury received in his service it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault, neither is the mere fact that it resulted from the carelessness of some other person in the same employment evidence of any fault on the part of the employer, and if the jury find that any defect existed in the planking of the street crossing which was cause of the plaintiff becoming injured notice of such defect must be brought to the knowledge of the employer in season before the accident to have repaired it, and such knowledge, if shown to have existed on the part of the fellow-employés of the plaintiff, would not be knowledge to the company. (Refused. It is not necessary that the fault should be of the master himself.) 544

8. If the jury find that the defendant, The Michigan Central Railroad Company, in the transaction of its necessary business had delegated the business of looking after and superintending the condition and repairs of its track as a department of its business to a superintendent of such department, notice of the defective planking in question to him would be notice to defendant, but any knowledge of such defect, if it existed only on the part of any of the plaintiff's fellow-servants in the same grade of employment [subordinate to such agent who has the superintendence and charge of repairs], would not be notice to the defendant. (Given, except that in brackets and as modified.)

9. If the jury find that the planking alleged by the plaintiff to be defective, whereby he received the injury complained of, was origi-

(Given as modified, except that the court instructs that there is no evidence of any original defect.)

nally, when laid, defective from unsoundness of material or from improper laying, resulting from which was the defect that was the occasion of his injury, then no notice to the defendant of this resulting defect in the planking was necessary, but otherwise and where the machinery, implements, and appliances
545 (in this case the planking) was originally proper and safe for the purpose designed notice of subsequent defects must in all cases be brought to the knowledge of the proper agents, to whom has been delegated the general control and management of the track and its repairs, as the only way to bring the knowledge home to the company (unless the defect was of such a character and had been so long in existence that it should have been discovered by those charged by the defendant with the duty of finding and repairing it).

10. The plaintiff, being an employé in the service of the defendant, cannot recover unless he shows to the satisfac-
(Refused.) tion of the jury either that the plank in question in the particular alleged was originally defective and unsafe for the purpose designed, or that, originally proper and safe, it became defective in the particular claimed to the knowledge of defendant and which defect defendant neglected to repair.

11. If the jury find that the plaintiff knew of this defect when he attempted the uncoupling of the car, in doing which
(Given.) he received the injury, then he could not recover in this case, though it should appear that the defect originally existed or that defendant, having knowledge of the subsequent defect, neglected to repair it; in such — he is chargeable with contributory negligence.

12. If the jury find that the plaintiff was in the employ-
546 ment of the defendant as night switchman at the time of the accident, and that he had been cautioned
(Given as modified.) and instructed by any one having charge and control of defendant's station, ground, and yard at that place not to attempt at any time to couple or uncouple cars, and that, contrary to such instructions and caution at this time, he attempted to do so and the injury complained of resulted from such attempt, then the plaintiff cannot recover (unless the plaintiff was after such instructions required by Bachelor to uncouple cars in their distribution in the yard).

13. The plaintiff cannot recover unless the jury find that the defendant in the matter of the alleged defective planking
(Given.) or in the repair of the alleged defect therein neglected to exercise due care, and that the casualty resulted from such neglect of the defendant without fault on the part of the plaintiff. One who is injured by the mere negligence of another who is not guilty of wanton or intentional wrong cannot recover any compensation if the party injured might by the exercise of ordinary care have avoided the consequences of the other's negligence or wrongful act.

(Refused.) 14. There is no evidence in this case tending to show that at the time of the accident the plaintiff was in the exercise of due care.

15. There is no evidence in the case tending to show that the defect complained of was occasioned or permitted to
(Refused.) exist by reason of any default or negligence of any officer of defendant or of any servant, employé, or
547 agent of such corporation for whose default or negligence occasioning injury to an employé the defendant would be liable.

The verdict of the jury should be for the defendant.

16. There is no evidence tending to show that defendant did not use due diligence in the employment of competent
(Given.) servants or that it in any manner acted toward plaintiff otherwise than in good faith.

17. It is not enough that plaintiff prove that the defect complained of actually existed as alleged. He
(Given except the last sentence.) must further show (before he is entitled to your verdict) that such defect was occasioned or suffered to exist at the time of the accident through the negligence of some person representing the defendant and who was not a coservant of plaintiff. This has not been shown, and plaintiff cannot recover in this action.

18. The evidence is undisputed that the plaintiff has been for several years in the employ of defendant in the
(Refused.) station yard at Niles, and familiarity with the yard, the track, and its appliances on his part is to be presumed, and you are not warranted to find from the evidence that plaintiff's acquaintance with the condition of the track and its appliances left him in ignorance of the defect complained of
548 and at the same time find that defendant was guilty for not warning him of the existence of and not repairing such defect before the accident.

19. It is in evidence in this case by the plaintiff's own testimony that he went between the cars about six feet east of
(Refused.) the east end of the planking on 5th street while the cars were in motion and walked westward while the cars were thus in motion between the same, and while thus walking caught his foot and was injured. This act of going between the cars while in motion was contributory negligence on the part of the plaintiff, and your verdict therefore must be for defendant.

20. If the jury find that the plaintiff was not nearer the east end of the planking on 5th street than six feet west there-
(Refused.) from, then in such case it would have been impossible for him to have got his foot caught in the broken plank at the east end of the same, and therefore he cannot recover in consequence of such defect.

21. The knowledge of the defect in the plank by witness Lino

(Given.) would not be knowledge of or notice to the company, and his failure or neglect to report said defect to the proper officer of the defendant would not be negligence of the company.

EDWARDS & STEWART,
Att'ys for Defendant.

[Endorsed:] Gardner *v.* M. C. R. R. Co. C. Bacon's copy of def't- request-.

549 And thereupon the Hon. Henry F. Severens, district judge, presiding as circuit judge, charged the jury that in accordance with the opinion of the Hon. Howell E. Jackson, circuit judge, on file in this cause, the said jury must render a verdict in favor of the defendant; and to this charge that the jury must render a verdict in favor of the defendant the plaintiff, by his counsel, duly excepted.

And thereupon the jury, without leaving their seats, rendered a verdict in favor of the defendant and against the plaintiff, and judgment was forthwith entered accordingly in the usual form.

And of the aforesaid opinion of the Hon. Howell E. Jackson, circuit judge, a copy is hereto annexed and marked Exhibit "J," and of the dissenting opinion of the Hon. Henry F. Severens, district judge, rendered at the same time that the last-mentioned opinion was rendered, a copy is hereto annexed and marked Exhibit "K."

550 The foregoing is a substantial statement of all the evidence and proceedings on said trial, and, inasmuch as the said several matters aforesaid, preceding the verdict and judgment, do not appear by the record of said court in said suit, the counsel for the plaintiff did then and there prepare the aforesaid exceptions to the rulings, decisions, and opinions of said judge and did request him to sign this bill of exceptions, containing the several matters aforesaid, pursuant to the statutes in such case made and provided and the rules and practice of this court; and thereupon the said judge, at the request of the counsel for the plaintiff aforesaid, hath signed this bill of exceptions, pursuant to said statute, rules, and practice, on this fifth day of November, A. D. 1889. Time for settling such bill was duly extended to this day.

HENRY F. SEVERENS,
Dist. Judge.

551 EXHIBIT E.

No. 257.

Michigan Central Railroad Time-table, to Take Effect Sunday, March 26, 1882, at 12 o'clock Noon.

All trains run by Chicago time.

This time-table is in no case intended for the information of the public, nor as an advertisement of the time or hours of any train.

The company reserves the right to vary them at pleasure. It is for the information of employés only.

Read carefully rules and foot-notes.

See changes in rules Nos. 19, 23, 52, 53, 54, 91, 111, 112, 115.

Destroy all former time-tables.

Rules and Regulations.

Rule 6. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars and engines cannot be uniform in size, style or strength, and is liable to be broken and from various causes renders it dangerous to expose the hands, arms or persons of those engaged in coupling, all employés are ENJOINED, before coupling cars or engines, to *examine* so as to KNOW the kind and condition of draw-head, draw-bar, bumper, link and coupling apparatus, and to *report* any car or engine with a defective coupling to the Yard Master *of* Conductor, and are prohibited from placing in the trains any car with a defective coupling until
552 they have first made such report of its *first made such report of its* defective condition. Coupling by hand is strictly forbidden *in all cases*, and each Yard Master, Switchman, Brakeman or other employé, who may be expected to couple cars, is required at all times to use a stick for that purpose. Sticks will be furnished on application to the Train Master of the Division.

Rule 44. Any employé observing any obstructions or damage to road or bridges, or observing any circumstance that indicates danger in any way, will leave at nearest telegraph station, a written report of the same, and will take such further steps as will insure safety. All such reports must be telegraphed by the Agent or Operator to Division Headquarters, and notice of the obstruction or danger must be given to conductors of all trains until orders are received from Division Headquarters to discontinue such notice. Conductors will report by telegraph to Division Headquarters, all heavy storms or rains, liable to affect the road. Operators will report by telegraph to Division Headquarters all sudden changes in weather.

Rule 159. ALWAYS TAKE THE SAFE SIDE IN CASES OF THE LEAST UNCERTAINTY.

553 At a general term of the circuit court for the county of Berrien, commenced and held at the court-house, in the village of Berrien Springs, on Monday, the thirteenth day of April, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Andrew J. Smith, circuit judge.

EXHIBIT F.

The court was opened for business in due form.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

In this cause the verdict of the jury having heretofore been entered and damages of the said plaintiff duly assessed by said jury at the sum of five thousand dollars over and above his costs and charges by him about his suit in this behalf expended, which said verdict was entered as aforesaid on, to wit, Thursday, the 7th day of February, 1884, in this court, and the said defendant having then and there—that is to say, on said 7th day of February, A. D. 1884—been granted an order allowing, among other things, twenty days within which to move for a new trial and judgment not to be entered until the expiration of said twenty days, and then only in the event of motion for new trial denied;

And it satisfactorily appearing to the court now here that said motion for new trial was denied, and that twenty days have elapsed since the entering of said verdict and of said order—

Now, therefore, on motion of O. W. Coolidge, Esq., attorney for the said Frederick Gardner, and with consent of the defendant, it is

554 ordered and adjudged by the court now here that the said Frederick Gardner do recover against the said Michigan Central Railroad Company his damages as aforesaid, to wit, five thousand dollars and interest thereon from the rendition of judgment, amounting to the sum of four hundred and sixty-six dollars, being, in all, damages and interest for the sum of five thousand four hundred and sixty-six dollars, together with his costs and charges aforesaid, to be taxed, and that the said Frederick Gardner have execution therefor.

Thereupon court adjourned until to-morrow morning at the hour of half past eight.

ANDREW J. SMITH,
Circuit Judge.

Here follows certificate of Thomas O'Hara, clerk of said circuit court, dated April 23, 1885, and with the seal of the court thereon.

555 At a general term of the circuit court for the county of Berrien, continued and held at the court-house, in the village of Berrien Springs, in said county, on Wednesday, the 28th day of April, A. D. 1886.

Present: The Hon. Andrew J. Smith, circuit judge.

EXHIBIT G.

The court was opened for business in due form.

Among other business then and there had and appearing of record is the following, to wit:

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY. } Case.

Whereas in this suit a certified copy of the judgment of the supreme court reversing the judgment of this circuit court for the county of Berrien and vacating the verdict of the jury has been filed with the clerk of this said circuit court as a remittitur from said supreme court to this said circuit court, and this cause having been duly noticed and placed upon the calendar for trial at the present term of this court:

Now comes said plaintiff, Frederick Gardner, by O. W. Coolidge and Edward Bacon, his attorneys, and voluntarily withdraws this suit and submits to a nonsuit therein.

Therefore, on motion of said plaintiff, by his said attorneys, it is ordered by the court now here that the said plaintiff be, and is hereby, nonsuited without prejudice to any right of said plaintiff to bring any suit in any court.

And it is further ordered that said defendant recover against said plaintiff its lawful costs to be taxed and may have execution therefor.

556 Thereupon court adjourned until half past eight o'clock tomorrow morning next. ANDREW J. SMITH,
Circuit Judge.

Here follows certificate of Herbert L. Potter, clerk of said circuit court, dated April 5th, 1888, with seal of court.

557 EXHIBIT "I."

Opinion of Michigan Supreme Court in Gardner v. M. C. R. R. Co.

Railroad injury—uncoupling cars.

1. A switchman, who had been strictly cautioned against having anything to do with uncoupling cars, tried to uncouple some while the train was moving and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman, and the railroad company had no notice of it. Held that he could not recover for the injury resulting to him.
2. A railroad employé takes the ordinary risks of the work for which he hires, and if the company has used proper diligence in choosing competent servants it is not liable in damages for an injury to one of them caused by the carelessness of another.

Error to Berrien. (A. J. Smith, C. J.) Oct. 15, 16; Jan. 6. Case. Defendant brings error. Reversed.

Edwards & Stewart and Ashley Pond, for appellant.

O. W. Coolidge and Edward Bacon, for appellee.

SHERWOOD, *J.:*

This is an action of trespass on the case brought by the plaintiff to recover damages for injury sustained by him on the morning of

the 16th day of May, 1882, at the city of Niles, while attempting to uncouple cars in a moving train and while in the service of the defendant. The cause was tried at the Berrien circuit, before Judge Smith, by a jury at the February term, 1884, and a verdict was rendered for the plaintiff for $5,000 damages. Defendant brings error.

558 No question is raised upon the pleadings. From the record it appears that in the city of Niles, Fifth street, running north and south, crosses the Michigan Central railroad tracks. At this crossing, besides the main tracks, there are of all kinds six others. These several tracks occupy a large portion of defendant's right of way at this crossing, and thirty-two feet of the traveled part of Fifth street was very well planked between the tracks by the company with pine planks three and one-half inches thick, and which were laid new the fall before the injury complained of occurred.

The company's station-house, dining hall, and freight-house and other depot buildings at Niles were located at this point, and a large number of trains were arriving and departing during the day and night. The services of a number of men in the yard and freight-house and about the grounds were required to look after and do the business at this station. Mr. Gregg was station agent during 1882 at Niles, and had been for more than thirty years. E. D. Bachelor was yard master, and had been years before. He had control of all the help in the yard, but was not at the station much during the night, and when he was absent he left one of the men employed in the yard named Etscorn in charge. It further appears that near the southeast corner of the planking in Fifth street and about twelve or fifteen feet therefrom stood a switch. This switch moved the track south in adjusting it for the passage of trains, and at some time previous to the morning the injury occurred to plaintiff (the exact time, however, is not shown by the record), owing to the failure of a proper adjustment of the switch, a car wheel had struck the end of a plank next to the rail of the track, breaking it and crushing it

559 down, making a hole in the surface seven or eight inches long and between three and four inches wide. This appears to have been the only defect in the planking or anywhere in the grounds about the station yards. It further appears that it was the duty of the yardmen to examine and make discovery of any defect in the planking or any other places in the yard and at once repair the same and call on the track master for the necessary materials for that purpose when they were not on hand at the station.

The plaintiff was a resident of Niles and had been for eighteen years at the time he received his injury; was forth-five years of age, and had been in the employ of the company continuously in various capacities for twelve years. He had worked with a gravel train and afterwards at the freight house and yard for ten years, and immediately previous to the accident had for six months been one of the yardmen, working under the direction of Mr. Bachelor, the yard master.

His immediate business at the time he was hurt was night switchman, working from six o'clock in the evening until seven o'clock in the morning, and he was employed most of his time at the east end of the yard, from Fifth street east. His work was to tend switches for trains going east and west and see that they got water, and when his work was done he had orders from Bachelor to help the other men make up trains. The plaintiff says in his testimony when he went to work in the yard Bachelor employed him as night switchman; that there was no danger about that business; that Gregg, on the 16th of May, 1882, had charge of the station, but not of the yard; that on the 17th of February previous Gregg told him "not to undertake to couple cars;" that
560 on the morning of that day he was helping a brakeman and got caught by a car, and Bachelor and Gregg both came to him and told him that was not his business; that he should let the cars go and attend to his business; that at about half past five o'clock in the morning of the 16th of May, 1882, and about five minutes before he was injured Etscorn was coming out of the freight-house with an engine and five cars and had cut off the end car and got up on top of it to hold it. Plaintiff then asked him where he wanted those cars. Etscorn replied, "One in and one out." To which plaintiff answered, "Then set the switch over and motion the engineer ahead," and stepped in to uncouple the cars, pulled the pin and laid it on the deadwood. The cars were in motion at the time, going west, and he moved along between them as the cars moved until he got ready to come out, when his right foot caught in the hole in the planks before mentioned and held him. He looked back to see what held it, but did not have time to get his foot out before the brake struck him and knocked him down, and after being carried several feet the car wheel came upon his left leg, crushing it to the thigh, rendering amputation necessary. It further appears from the testimony of the plaintiff that at the time of the accident it was light; that he could see pretty well; that he did not know of the defect in the plank; if he had, he could have seen it; that he might have passed it a hundred times and not have seen it; that it was of such a character, if his attention had not been called to it, he could not have seen it; that he never discovered any defect in the planking at that crossing before; that he had always regarded it as a good and proper crossing for the
561 purpose and place, and that he was familiar with the station grounds. The foregoing facts were all uncontroverted by the plaintiff and most of them appeared in the plaintiff's own testimony.

The other testimony went strongly to show that the existence of a defective plank was known only to two of defendant's yard hands, and they both swear that they had never made the fact known to the company or to the yard or station masters, and Mr. Bachelor testifies that when he hired the plaintiff he gave him express instructions what he wished him to do—"Directed he should not pull pins or do any coupling in any way;" that he forbade his doing this again in November following, and that he never countermanded

that direction; that there was other business in the yard for the plaintiff to do.

The plaintiff now seeks to recover the damages he has sustained in the loss of his limb, alleging in the declaration negligence on the part of the defendant in suffering the defect in the plank described to continue unrepaired until it occasioned his injury, and averring no neglect on his part contributing to the accident.

The defendant in making its defense claimed—

1st. That the defect was a very slight one and not known by the company to exist at the time the injury occurred; that the plaintiff was an employé of the company; that his duties in the yard required him to look after such defects when they occurred, and that his particular business and its locality furnished him with as good, if not better, opportunities to have known of the defect complained of than the occupation and duties of any other employé of the company.

2. That such defect, if one existed in the planking which caused his injury, if the result of negligence at all, was that of a
562 fellow-servant and of which the company had no previous notice, and was therefore a part of the risks the plaintiff assumed when he entered the employ of the company as incident thereto.

3. That it was negligence on the part of the plaintiff to attempt to do what he did while the cars were in motion, and that such negligence was really the cause of the injury.

4. That what he did was in actual disobedience of the orders of the yard master, under whose control and direction he was required to serve, as well as those of the station agent, and without the request of any one. That for these four reasons the plaintiff ought not to recover.

The undisputed proofs show in this case that the defect in the planking complained of was one which might occur and day from slightly misplacing a switch or the accidental derailing of a truck wheel or from various other causes purely accidental; that the injury to the plank was so small as to escape the notice of all the persons in the yard except two, and even that of the plaintiff, who was daily within ten or twelve feet of it from once to a dozen times a day, and it would appear that even the two persons who did see it did not deem it of consequence enough to report it to the yard master or repaur it themselves, it being their duty so to do if it was dangerous, and there is no pretence that the company had actual notice thereof.

There is no testimony to show or tending to show that any of the persons were careless, incompetent, or unskilful when they were employed by the company and placed in charge of its business
563 at Niles station; but, on the contrary, the undisputed evidence is that they were all very competent men who had long experience in all branches of the business. It would seem that the defendant had done its whole duty in the premises, and it is quite clear, I think, that the only ground upon which the plaintiff can rest his claim must be that of negligence of a fellow-servant en-

gaged in the same employment, and the rule is well settled that when the company uses due diligence in the selection of competent, skillful, and trusty servants it is not answerable in damages to one of them for any injury received by him in consequence of the carelessness of another while both are engaged in the service of a common master.

Farwell *v.* Boston and Worcester Railroad Corporation, 4 Met., 49; 2 Thompson on Negligence, 924. A person "who engages in the employment of a railroad company for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such service," and these include the perils arising from the carelessness and negligence of those who are fellow-servants or engaged in the same employment, and it is of little consequence of what grade the servants may be, except (as is well said by Chief Justice Cooley in his work on Torts) "as superior authority may render the negligence more dangerous and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to reprove it" (Cooley on Torts, 544), and this doctrine is fully supported by the following authorities, among others: 2 Thompson on Negligence, 927; Gallagher *v.* Piper, 16 C. B. (N. S.), 679-694; Wigmore *v* Jay, 5 Exch., 354; Feltham *v.* England, L. R., 2 Q. B., 33; Chicago, &c., R. R. Co. *v.* Murphy, 53 Ill., 336; 564 Summersell *v.* Fish, 117 Mass., 312; O'Connor *v.* Roberts, 120 Mass., 227; Zeigler *v.* Day, 123 Mass., 152; Warner *v.* Erie R'y Co., 39 N. Y., 488, 470; Coon *v.* Syracuse, &c., R. Co., 5 N. Y., 492; Columbus, &c., R. Co. *v.* Arnold, 31 Ind., 174; Hard *v.* Vermont and Canada R. Co., 32 Vt., 473; O'Connell *v.* Baltimore & Ohio R. Co., 20 Md., 212; Ryan *v.* Cumberland Valley R. R. Co., 23 Penn. St., 384; Pittsburgh, &c., R. Co. *v.* Devinney, 17 Ohio St., 197; Morgan *v.* Railway Co., L. R., 1, Q. B. 149; Giman *v.* Eastern R. Corp., 10 Allen, 233; Lawler *v.* Androscoggin R. Co., 62 Me., 463; Quincy Mining Co. *v.* Kitts, 42 Mich., 34; Michigan Central R. Co. *v.* Austin, 40 Mich., 247; Day *v.* Toledo, C. S. & D. R. Co., 42 Mich., 523; Crispin *v.* Babbitt, 81 N. Y., 516; Brick *v.* Rochester N. Y. & P. R. Co., 98 N. Y., 211; McCosker *v* Long Island R. Co., 84 N. Y., 77; Wright *v.* N. Y. Central R. Co., 25 N. Y., 565. It is said by Mr. Chief Justice Shaw in speaking upon this subject: "We are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know and against which he can as effectually guard as the master." Farwell *v.* Boston & Worcester Railroad Corporation, 4 Met., 49.

Especially is this true in this case under the circumstances disclosed in this record, for it is shown to have been a part of the duty of the plaintiff to have discovered the defect in the planking complained of and to have repaired the same as well as that of the track master.

I think that it must be conceded that had the defendant not gone in between the cars while they were in motion he would not have

received his injury. He was not required to do this by any
565 person, and it was most certainly no part of his duty so to do.

It was claimed by counsel for plaintiff that plaintiff was acting under the direction of Etscorn at the time the injury occurred. The evidence, however, does not support this claim. Etscorn was that morning, he says, doing his own coupling and uncoupling, and the plaintiff says that he (plaintiff) asked Etscorn, as he was making a change of cars, "What next?" and Etscorn replied, "One car in and one car out," and that this is all that was said, and Etscorn says he did not ask plaintiff to do anything that morning; did not ask him to help him. Clearly this talk shows no direction to plaintiff to uncouple the cars.

Usually the movement of cars while the brakeman is attempting to couple or uncouple them is under his direction, and contributory negligence on his part in his endeavor to make the coupling while the cars are in motion or in failing to regulate the movement of approaching cars when it is within his power to do so by the exercise of ordinary care has been held sufficient to prevent his recovery for injuries received. Muldowney *v.* Illinois Cent. R. Co., 36 Ia., 462; Williams *v.* Ia. Central R. R. Co., 43 Ia., 396; Marsh *v.* South Carolina R. Co., 56 Ga., 274, 277. I am inclined to the opinion, however, that the correct view is taken upon this subject in Snow *v.* Housatonic R. Co., 8 Allen, 441. In that case the court held that if a brakeman cannot easily uncouple cars when the train is standing still and in endeavoring to uncouple them when the train is in motion he steps between the cars and there meets with an injury which is caused by a want of repair in the road-bed, it cannot be ruled he
is careless as a matter of law, but the question is then one for
566 the jury. Belair *v.* Chicago, &c., R. Co., 43 Iowa, 662.

We are relieved from further consideration of this subject, however, in the present case. It clearly appears by the record that the plaintiff's duties were those of switchman, and that when hired and subsequently he was ordered by those who had the authority to direct him what to do not to attempt to perform the kind of service in which he received his injury, and that in open violation of these orders and without the direction of any person he undertook to perform the hazardous work of uncoupling which was fraught with such disastrous results. Under the circumstances and testimony undisputed, I think it must be held that the plaintiff necessarily took the risk; that it was his voluntary act, and the defendant cannot be held liable upon the facts appearing in this record.

These views render discussion of the other points made unnecessary.

The judgment must be reversed and a new trial granted.

Campbell, C. J., and Champlin, J., concurred.

MORES, *J.*, dissenting:

I think this case was properly submitted to the jury, and that the verdict should not be disturbed. From the plaintiff's evidence, as I read the record, it appears that after he was ordered not to un-

couple cars he was told by the yard boss under whose orders he was acting on the 7th of May that he "must help the boys in the morning;" that he wanted to help John Etscorn. Plaintiff says to the yard boss: "All right. You told me once that I should not do this work. I had nothing to do with it." The boss replied: "I
567 cannot help it now. The trains don't get off in the morning. The South Bend train is late pretty nearly every morning. We have not got men enough to get the cars ready. You must help them." This seems to be a plain command to the plaintiff to do this work whenever the trains were late and did not confine him to a single morning. Plaintiff then helped the boys every morning, coupling and uncoupling cars, until the accident.

The testimony introduced on the part of the plaintiff, and we have nothing to do with the evidence on the behalf of the defendant in considering the question whether the case should have been submitted to the jury, tended to show that this defect had existed for a month; that it was a dangerous break the sequel shows. I think it was the duty of the yard master to see to it that this track and the others being almost constantly used in moving cars and coupling them in this yard was in a safe condition so that the lives of the men who were compelled to do the coupling on this ground by their employment were not endangered or their persons put in peril, and being in charge of the yard, with this duty incumbent upon him, his negligence would be the negligence of the company.

The question whether he was negligent was, under the plaintiff's proofs, in my opinion, a question for the jury, as was also the negligence of the plaintiff.

The plaintiff, under his proofs, was entitled to go to the jury. The question as to whether he or the defendant's witnesses should be believed was also a matter for them to determine. They found in his favor and I can find no error in the record.

568 Circuit Court, W. D. Mich.

FREDERICK GARDNER
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY.

On motion for a new trial. Opinions announced July 30, 1888.

Mr. Edward Bacon, Niles, and Mr. O. W. Coolidge (Niles), for plaintiff; Edwards & Stewart (Kalamazoo), for defendant; Mr. Edwin F. Uhl (Grand Rapids), and Mr. Ashley Pond (Detroit), of counsel.

EXHIBIT "J."

JACKSON, *Circuit Judge*, orally:

We have considered the case of Frederick Gardner against the Michigan Central Railroad Company, on the motion for a new trial. It is hardly necessary, in the absence of counsel for the other side, to

go fully into a review of the questions involved here; nor would it be necessary, if they were present, to go into a consideration of all the errors that are claimed in the charge of the court to the jury in this case in the view that is taken of the case by the circuit judge.

I am clearly of the opinion after a thorough examination that the case as it stood in the State court and in this court should have been withdrawn from the jury. The suit is an action for damages by the plaintiff against the Michigan Central Railroad Company for an injury sustained on the 16th of May, 1882. The ground of negligence alleged against the company is that there was a defect or broken place in the east end of the plank at Fifth-street cross-
569 ing in the city of Niles, and that, in undertaking to uncouple cars that were being switched in the yard, he stepped into that hole and was caught in a way to be pushed down by the train and run over, so that his left leg was crushed and had to be amputated. He sued in the State court, the circuit court for the county of Berrien, and obtained a verdict for five thousand dollars. The defendant sued out a writ of error to the supreme court of Michigan, where the case was fully considered, and that court reached two conclusions: First, that the defendant was not guilty of negligence, and, second, that the plaintiff was, and on both grounds decided that he was not entitled to recover. He then moved out of the State of Michigan and into the State of Indiana and brings his suit for the same cause of action in this court, and he has presented here in support of his action precisely the same ground of recovery that he sought to maintain his action upon in the State court; so far as the negligence of the company is concerned and so far as his own negligence is concerned, he has not varied the case in any substantial respect. The case here is, substantially, on the evidence, the same case which the supreme court of Michigan decided and held that he was not entitled to recover. In respect to the negligence of the company I say the evidence is precisely the same. It is not changed a particle; and as I read the opinion of the supreme court of Michigan they base their decision on the two grounds: First, that there was no negligence on the part of the company under the facts shown, and, second, that the plaintiff himself was guilty of contributory negligence.

Now, I say, in respect to the first ground upon which the supreme court rests its decision, the evidence here and the
570 evidence before the State court are identically the same. There is no material variation, such as would warrant this court in changing the law as applied to it by the State court of Michigan; and, further than that, reading the evidence in this case in this court and comparing it with that in the State court, the defendant has itself made a stronger case than it did in the State court. So we should apply, I think, the rule of law to this case just as it should have been applied if the trial had been in the State court, and in respect to such a trial we have a late decision of the supreme court of Michigan, the case of Mynning *vs.* Lansing & Northern Railroad Company, reported in the 35 Northwestern Reporter. It is identically this case. In that case Mynning had

obtained a judgment against the railroad company based upon alleged negligence on the company's part and the exercise of due care on his own. The supreme court reversed the finding of the jury and the action of the court below and held on the evidence that it did warrant a finding in favor of the plaintiff. They wrote an opinion, sending the case back for a new trial. On the new trial the same evidence, substantially, was introduced that had been introduced on the first, and the judge charged the jury somewhat on the same theory or principle on which the jury in this case was charged, and the case was taken again to the supreme court of Michigan, and the court, in a very carefully prepared opinion by Judge Champlin, held that the action of the lower court, and that, the case being retried on substantially the same evidence that was before the supreme court, the circuit judge ought to have instructed the jury that the plaintiff could not recover.

571 That rule is followed by Judge Drummond in E. W. Hazard *vs.* Chicago, Burlington & Quincy Railroad, 4 Bissell, 543, which lays down, I think, the correct principle to be applied in a case like this; that where a retrial is had substantially upon the same evidence that the trial court should direct the jury that the plaintiff is not entitled to recover. And so I conclude here, without going into a consideration of the errors alleged to be in the charge, that, this evidence being substantially the same, and, if changed in any respect, changed against the plaintiff and in favor of the defendant, the trial judge should have instructed the jury that the plaintiff had not made out a case that entitled him to recover, and that he should have withdrawn the case from the jury and directed a verdict for the defendant. These are my conclusions after having carefully examined the law and the record.

Exhibit "K."

Severens, *District Judge*, orally (dissenting):

In this case, after careful reflection given to it since the argument, I find myself unable to concur with the circuit judge in his view in regard to the law of the case; and it is, perhaps, proper that I should state in a brief way the ground upon whic- I dissent. I agree with him that the plaintiff upon the trial here should be under the same limitations and restrictions that he would have been under if the case had been retried in the Berrien circuit court after it was remanded there by the supreme court of the State of Michigan and a new trial ordered.

I quite agree that the plaintiff should not be suffered, after having tried his chances in a tribunal having authority, to try them over again in the tribunal of another jurisdiction; and so upon that point I entirely concur.

572 But I hold that the effect of the decision of the supreme court, coupled with its order for a new trial, was to leave to the plaintiff on that new trial an opportunity by the production of new evidence, cumulative, if you please, to make out any point

necessary to entitle him to recover; and that, on producing such new evidence, he might satisfy a jury properly that the facts upon which he based his action were established I do not think that it was the intention of the supreme court of the State of Michigan to require that the plaintiff on a new trial should make out any other cause of action or make it out upon any other or different line from that on which the case was originally tried. They remanded it to be retried upon the identical issue that it had been tried upon before. No amendment of the pleadings in the case was suggested or apparently contemplated by the supreme court, and the indications are clear to my mind that it was expected that the case would be retried upon the same cause of action and upon the same allegations in the pleadings as on the first trial. Now, on the first trial, there was evidence adduced in support of each of the several grounds necessary to be made out by the plaintiff to entitle him to recover. There was evidence upon all the branches of the case—that is, as far as it is necessary for me to go in that direction.

When the court sent it back for a new trial they must have expected, as I think, that the evidence to be adduced would be simply additional and cumulative. It might be of a more convincing character to establish the same points if, as I have already said, it must be understood that the supreme court supposed the same issue upon the pleadings would be tried
573 over again. Now, upon the trial here, that doctrine was intended to be applied substantially, namely, that upon this retrial the plaintiff might adduce evidence additional to that provided before, and, if of such a convincing character as to satisfy the jury that the facts which the supreme court declared in the case before them did not exist did in fact exist, that the plaintiff had the right to have that fact so found and so declared by the jury, and it seems to me that to withdraw the case from the jury under such circumstances and decide the matter by the court is in effect to deny that the party plaintiff had any right after judgment in his favor had been reversed in the supreme court of the State of Michigan to recover u-on the ground of action stated in the pleadings. I cannot but think that the view taken by the circuit judge would in effect substantially prevent the plaintiff from ever in the State courts or elsewhere establishing the same grounds as the cause of action that were involved in the case when it was tried in the State court. I think it was a question for the jury, and, however needful it may be that the action of juries should be sharply looked after and carefully guarded in cases of this character, I think that if any extraordinary remedy is to be applied it is to be done by the legislature. I think that the courts have no power to apply any other or different rule from that which would apply between individuals. I do not suppose that it is intended in this case to apply any other rule, but I make this suggestion in connection with my own view of the case and to explain that however much I might be inclined to take such action as would rightfully or properly guard the
574 interests of the defendant in such cases I think that as the law stands where a case is situated as this was, upon evidence

which according to my view was fresh and upon which a jury might have reached a different conclusion, that the matter must be left to the jury to settle by their verdict.

JACKSON, C. J.: Mr. Uhl, in order to have as little expense as possible in the retrial of the case (and a retrial will be awarded) the parties may reach this question directly by just submitting this same evidence to the jury without calling witnesses here or going to that expense. You may submit this case to the jury and we will either certify this question or the trial judge will state to the jury that in conformity to the opinion of the circuit judge they are directed to find a verdict on this evidence for the defendant. We will accommodate counsel in either way. The circuit judge does not wish to put the district judge in the position of making such a ruling of his own accord, because the circuit judge must take the responsibility of his decision and the district judge the responsibility of his own decision. But in either way, to meet the views of district judge and counsel, we will give you a quick decision and let the other side take the case up on appeal.

Mr. UHL: I suppose that may be a matter of conference.

JACKSON, C. J.: Yes. As the plaintiff is not in condition to bring his witnesses here at heavy expense, we suggest that you take this state of facts which you have in this record and we will cer-
575 tify, sitting together, and the district judge will disagree with the circuit judge on the question as to whether the case should be taken from the jury, or the district judge, in the absence of the circuit judge, will instruct the jury that they must find for the defendant, and that he gives that instruction in conformity with the ruling of the circuit judge on the question of a new trial.

Let a new trial be ordered.

[Endorsed:] United States of America. In the c't c't of the U. S. for the sixth c't for west. dist. of Mich., southern div. Frederick Gardner *vs.* The Michigan Central R. R. Co. Opinion of both judges on the decision of motion for new trial.

576 [Endorsed:] United States of America. U. S. c't c't for the sixth c't & west. dist. of Mich., south. div. No. 2227. Frederick Gardner, plaintiff, *vs.* The Mich. Central R. R. Co., defendant. Bill of exceptions. Filed Nov. 5, 1889. C. L. Fitch, clerk.

577 THE UNITED STATES OF AMERICA, } *ss:*
Western District of Michigan, Southern Division, }

I, Charles L. Fitch, clerk of the circuit court of the United States for the western district of Michigan, do hereby certify that the foregoing is a true and compared copy of the declaration, plea, journal entries, assignments of error, and copy of writ of error lodged with clerk, and bond in error, together with the original bill of exceptions, writ of error, and citation in the proceedings of said court in said entitled cause, and of the whole thereof.

Witness my official signature and the seal of said court, at Grand Rapids, this 20th day of January, in the year of our Lord one thousand eight hundred and ninety.

{Seal of the U. S. Circuit Court, Western District of Michigan, Southern Division.}

CHARLES L. FITCH, *Clerk*,
By —— ——, *Deputy*.

Endorsed on cover: Case No. 13,967. W. Michigan C. C. U. S. No. 309. Frederick Gardner, plaintiff in error, *vs.* The Michigan Central Railroad Company. Filed February 17, 1890.

Stamped: Office Supreme Court U. S. Filed Jan. 29, 1890. James H. McKenney, clerk.

FILED.
JAMES H. McKENNEY,
CLERK.

72 72

—IN THE

SUPREME COURT

OF THE UNITED STATES.

FREDERICK GARDNER,

Plaintiff in Error,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY,

Defendant in Error.

BRIEF

FOR PLAINTIFF IN ERROR.

EDWARD BACON,

.....

.....

Of Counsel for Plaintiff in Error.

NILES RECORDER PRINT.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FREDERICK GARDNER, PLAINTIFF IN ERROR,

VS.

THE MICHIGAN RAILROAD COMPANY,

DEFENDANT IN ERROR.

BRIEF ON BEHALF OF FREDRICK GARDNER, PLAINTIFF IN ERROR.

STATEMENT.

This is an action of trespass on the case against the Michigan Central Railroad Company by Frederick Gardner, an employe, to recover damages because of negligence. The Circuit Judge directed a verdict in favor of defendant. On the trial of this case October 16th, 1888, in the Federal Court, there was plain and direct evidence tending to prove the following statements; viz., that for more than a year next prior to August 1882, Edwin D. Batchelor had been yard master of the Michigan Central Railroad Company, at Niles, Michigan.

He had control and management of the switches and of all work belonging under the general designation of "making up trains." He had an assistant yard master by day—John Lino (152–153) and by night was exclusively represented by John Etzcorn, known as night yard master (79–190–191–210–231.)

In 1881 the yard master Bachelor on behalf of the company, employed the plaintiff Frederick Gardner, to do work known as tending switches at night, his hours being from six o'clock P. M. to seven o'clock A. M. (80–202.) It was not the duty of the yard master nor of the yard men his employes—one of whom was the plaintiff—to have charge of or repair the road bed or street crossings; all this belonged to another department different from his, and under the supervision of George W. Doliver, the road master (55–89–219–247.) Prior to March, 1882, the yard master Bachelor had ordered the plaintiff utterly to desist from the work known as "making up trains" which included coupling and uncoupling cars (80–203–204.) Afterwards and prior to May 16th, 1882, the supply of help for making up trains especially in the morning, not being equal to the demand (188–189) the yard master required the plaintiff to assist in making up trains including coupling and uncoupling cars (80–81–82.) The plaintiffs' testimony on this subject is but feebly denied by the yard master Bachelor, in his deposition on behalf of the company (216–217) and on the trial in the Federal Court, October 16th, 1888, was corroborated by the testimony of the disinterested wittness Jacob Kemple (170–171). That for some time next prior to May 16th, 1882, Frederick Gardner had been complying with the requirement of the yard master, was proved by the testimony of John Etzhorn as well as by that of plaintiff (82–193–194.)

On the morning of May 16th, 1882, at the time the plaintiff received his injuries, he, in the absence of the yard master, was acting under the special order of John Etzcorn in uncoupling cars and was obeying this special order as well as the general order of the yard master. The plaintiff testifies to the special order (83–84.) If John Etzcorn as a witness for the company has attempted to deny the special order as stated by the plaintiff, he has substituted in place thereof another special order of like effect (186-187-193.) The plaintiff's declaration alleges that the Michigan Central Railroad Company negligently caused and ollowed to remain for a long time prior to May 16th, 1882, the hole in the planking on Fifth Street crossing, a thoroughfare near to its station house in Niles; this hole is represented by the photograph on page 184 (being original page 399) and the locality is represented by the map on page 248 (original

page 532) the map being given in evidence by the Company (248.)

The allegations of the declaration concerning this hole were proved by the deposition of John Lino (153-154) and by the testimony of Jacob Kemple (169.) A wooden exhibit to represent the hole has been used on all the trials in this suit and from this the photograph was taken (37-38-184.)

When the plaintiff in obedience to orders and in sight of John Etzcorn uncoupled the cars just before he received his injury, the hole was hidden under the car uncoupled (97-99-116.) There was a down-grade sloping west at the place where the plaintiff received his injuries (177-207-242) and the cars, according to necessity and general usage (177-182-208.) were in slight (241) motion at the time. As the plaintiff was stepping out northward from between the cars one of his feet was firmly caught in the trap-hole; he threw his body to the northward (91) and did all he could by use of his voice and signals to have the engineer Waltz stop the westward progress of the cars (85) but in vain. The westward motion ought to have been stopped within five feet (176-178-180-181.) but by the incompetency and negligence of the engineer (156-246) the westward motion was continued to a distance of about sixteen feet (86) the plaintiff's left foot being crushed under a car wheel and his body being shoved along by the low brake beam. The plaintiff's injuries might not have necessitated the amputation of his leg as they did (88-38) had it not been for the distance that the westward motion was continued, in disregard of his signals and cries (86,) and when the engineer became aware of the terrible work he was doing, he, instead of stopping, according to signals (234) commenced a vigorous eastward motion of the cars which he continued about a car's length and in so doing, by the action of the low brake beam with its lower shoe in grasping and breaking the plaintiff's bones (86-87) caused new and very great injuries to the plaintiff by incompetency and neglect of his duty to duly look out (246-241). The testimony of the engineer shows that he had received a signal to stop (234) and that in going east as he did, he was probably acting on his own responsibility as he was in going west without regard to any signal (240.) This engineer was an apprentice in his business (239) and there was direct testimony as well as the cogent circumstantial evidence tending to prove that he was incompetent (156.) The lowness of the brake-beam (87-155-209) and the new negligence of the engineer in moving eastward as he did, thereby causing new injuries to the plaintiff, not made necessary or probable by the injuries caused in going westward, gave to the plaintiff a new and additional cause

of action which to him seems entitled to a place in his declaration in the Federal Court.

Soon after the filing of the opinion, Exhibit I, Jan. 6th, 1886, Frederick Gardner, being by reason of his injuries disabled from supporting himself without the aid of his wife and children, (88) left Niles, Michigan, to find employment for them as well as for himself. He also intended to have honestly the legal right to bring this suit and because a resident and citizen of the large manufacturing town of Elkhart in the State of Indiana, where he ever afterwards continued to reside and be employed. His interests required material changes in the declaration filed in his suit. After he had been a citizen of Indiana for about a year (106), he in March, 1887, (11) commenced this suit with such declaration as he was advised to file in Cthe ircuit Court of the United States for the Western District of Michigan. No question as to citizenship has been raised on behalf of the defendant company by any plea and notice (13-14), by any written request, (253) by any motion or petition (111-112) or by any evidence whatsoever to contradict the plaintiff's testimony. The counsel for the company defendant cross examined the plaintiff at length on the subject of his removal to Elkhart (106-111.) The plaintiff's counsel called attention to the absence of any plea, notice or motion on the subject of residence. The court remarked (112) "The other question (meaning that of residence and citizenship) will be taken up when we get to it and I should think it might be advisable to get to it as soon as practicable if it is thought to be controlling in the case." The defendant's counsel remarked: "We can raise it at any time I suppose." The court answered: "You can finish the cross examination of this witness and then proceed." The court further remarked concerning this question, (113) "I do not understand it to be very material as there is no definite issue on that question."

At the end of the bill of exceptions (257) are the words "The foregoing is a substantial statement of all the evidence and proceedings on said trial." The record shows that the counsel for the company defendant voluntarily dropped the question as to the plaintiff's change of residence and never raised it in any form, either at the close of the plaintiff's cross examination or at any other time, although not only the plaintiff's counsel but the court called his attention to the absence of a motion and the necessity therefor. (Hartog v. Memory, 116 U. S., 588. Morris v. Gilmerr, 129 U. S., 326-328. Bucher v. Chesshire R. R. Co., 125 U. S., 578-79.)

The parties have stipulated (25) that both the bill of exceptions

and the return to the writ of error should be such as they are, showing that the question was never raised; obvious was the reason why. There could be no reasonable doubt that Frederick Gardner was in good faith a citizen of Indiana as alleged in his declaration (1.)

Concerning the direction for a verdict in favor of the defendant the presiding Judges were devided in opinion. The opinion of the Hon. Howell Jackson, Circuit Judge (266) is continued after the dissenting opinion of the Hon. Henry F. Severens, District Judge (268.) The case is before this court in accordance with the suggestions of the Circuit Judge (270.) The only question presented by the opinion of the Circuit Judge is, whether or not the opinion of the Supreme Court of Michigan Exhibit I, filed Jan. 6th, 1886, (260)—58 Mich., 584 (78)—was such as to require the Federal Court to direct a verdict in favor of the defendant.

SPECIFICATION OF ERRORS RELIED UPON.

I.

There was error in this that a verdict was directed in favor of the Michigan Central Railroad Company.

II.

There was also error in this that in taking the case from the jury, all evidence tending to prove for the plaintiff any cause of action was disregarded.

III.

There was also error in this that no decision or proceedings in the State Court justified the order directing a verdict in favor of the defendant.

IV.

In directing a verdict for the defendant there was error because of matters enumerated as follows :

1. On the trial in the Federal Court October 16th, 1888, there was such evidence in relation to the substance of the orders given to Frederick Gardner as tended to show that when he received his injuries, he was obeying and not disobeying these orders.

2. The orders to Frederick Gardner to help make hp trains, declared in Exhibit I to be among the uncontroverted facts of the case, were not, on the trial in the Federal Court, left without meaning or effect, as said exhibit shows that they were caused to appear to be left by the printed record mentioned in said exhibit.

3. On the trial in the Federal Court, there was new evidence, direct and circumstantial, showing such explanation of the order to Frederick Gardner to help make up trains as tended to show that when he received his injuries he was obeying and not disobeying orders.

4. On the trial in the Federal Court there was new evidence, direct and circumstantial showing explanation of the words exchanged between John Etzcorn and Frederick Gardner just before the injuries were received, and the explanation tended to prove that Frederick Gardner was obeying and not disobeying orders when he received his injuries.

5. On the trial in the Federal Court there was evidence tending to show that the hole mentioned in the declaration was caused by the defendant through its assistant yard master, John Lino, and by negligence of the defendant was left unrepaired for more than a month next before the plaintiff received his injuries, and that the company was affected with notice and not left unaffected with notice, as Exhibit I shows that the defendant was by the printed record mentioned in said exhibit, caused to appear to be left unaffected.

6. On the trial in the Federal Court there was evidence tending to show that the plaintiff was not within ten feet of the hole mentioned in the declaration from once to a dozen times a day, as Exhibit I declares that the printed record mentioned in said exhibit caused it to appear that he was.

7. On the trial in the Federal Court there was evidence tending to show that the hole mentioned in the declaration was not so little and unimportant as the opinion Exhibit I declares that the printed record therein mentioned caused it to appear to be.

8. On the trial in the Federal Court there was new evidence tending to show that there never existed any duty of Frederick Gardner to examine, discover and repair the hole mentioned in the declaration, as the opinion Exhibit I declares that the printed record therein mentioned caused such duty to appear to exist.

9. On the trial in the Federal Court the evidence showed without conflict that no negligence of any person other than the plaintiff could justify directing a verdict in favor of the company.

10. On the trial in the Federal Court the evidence showed without conflict that the defendant company had not done its entire duty as the opinion Exhibit I declared it would seem to appear by the printed record referred to in said exhibit or by something not mentioned.

11. On the trial in the Federal Court there was new evidence to

sustain, new allegations in the declaration.

12. To justify the order directing a verdict for the defendant, the opinion Exhibit I is not *res adjudicata* as to any matter wherein it is contradictory or without sufficient certainty, or as to any finding of fact or inference of fact or recital of evidence therein stated, or as to any *obiter dicta*.

V.

There was also error in this that the case was taken from the jury because of the supposed effect of the opinion Exhibit I as *res adjudicata*, notwithstanding that on the trial in the Federal Court the supposed duty of Frederick Gardner to find and repair the hole complained of, was declared in said opinion to appear from the record then under consideration, or from something unmentioned to be as plain as that of the road master, and on the trial in the Federal Court by direct evidence on both sides and by consent of parties, this supposed duty and all that depended upon it was taken out of the case.

VI.

There is also error in this that the case was taken from the jury on the theory that the opinion Exhibit I found the defendant to be not guilty of negligence; this finding depended on the finding of fact that the plaintiff was in duty bound to discover and repair the hole of which he complained, and that no neglect to repair could be through neglect of a fellow servant such as the yard master, whereas in the Federal Court it appeared without dispute that Frederick Gardner never had any such duty.

VII.

To justify the order directing a verdict in favor of the defendant, there was nothing in the evidence before the Federal Court as to the printed rules of the company, the omission therein to mention any uncoupling of cars, or as to the general and necessary practice of uncoupling cars in motion.

VIII.

To justify the order directing a verdict in favor of the defendant there was nothing in the evidence before the Federal Court in relation to any of the matters following, namely:

Any printed rule of the company defendant and the general disregard thereof.

Any negligence of any alleged fellow servant.

Any failure of the plaintiff to examine, discover or repair the hole mentioned in the declaration.

Any alleged contributory negligence of any nature whatsoever.

ARGUMENT.

I.

The Orders to Frederick Gardner.

Throughout the opinion Exhibit 1, from the initial words (261) "from the record it appears" to the closing words (265) "upon the facts appearing in this record," there are such repetitions of these words or their equivalents as to indicate plainly that the record spoken of was insufficient to show what might be shown on the new trial ordered. The opinion Exhibit I (262) has these words: "His immediate business at the time he was hurt was night switchman, working from six o'clock in the evening until seven o'clock in the morning he was employed most of his time at the east end of the yard, from Fifth Street east. His work was to tend switches for trains going east and west, and see that they got water and when his work was done he had orders from Bachelor to help the other men make up trains." Inasmuch as in obedience to the orders from Bachelor the plaintiff was helping to make up trains at the time he received his injuries, it is easy to perceive why the Supreme Court of Michigan meant that the insufficiency of the record might readily be supplied, though as to these orders from Bachelor the opinion does not expressly specify any insufficiency or declare without specification that any such insufficiency existed. The closing words (265) "that in open violation of these orders and without the direction of any person he undertook to perform the hazardous work of uncoupling," must if possible be reconciled with the words declaring the orders to help make up trains above copied, especially as these orders are mentioned as continuing orders and classed among the uncontroverted facts duly appearing by the record. The opinion attempts no reconciliation and leaves this to conjecture. Various conjectures may be made: first, that the record did not show the orders to be applicable; that it did not sufficiently appear that his other work was done. Secondly, that the orders to help make up trains did not sufficiently appear to include just that kind of service which the plaintiff was rendering when he was injured.

Thirdly: That the evidence which the opinion recites concerning the words that passed between John Etzcorn and the plaintiff, immediately before the injuries were received, in some way superseded or rendered inapplicable, the pre-existing orders from Bachelor to help make up trains. The recital of the testimony of the plaintiff and Etzcorn concerning these words and the surrounding circumstances existing, appear in the decision as essential to the result ob-

tained. The recital is as follows (265): "It was claimed by counsel for plaintiff that plaintiff was acting under the direction of Etzcorn at the time the injury occurred. The evidence however, does not support this claim. Etzcorn was that morning, *he says*, doing his own coupling and uncoupling and the *plaintiff says* that he (plaintiff) asked Etzcorn as he was making a change of cars, 'what next' and Etzcorn replied 'one car in and one car out,' and *that this is all that was said*. Etzcorn says he did not ask plaintiff to do any thing that morning; did not ask him to help him. Certainly this talk shows no direction to the plaintiff to uncouple the cars."

The opinion (262) places among the uncontroverted facts duly appearing by the record, a very different statement of the same exchange of words which is as follows: "Plaintiff then asked him where he wanted those cars; Etzcorn replied, 'one in and one out,' to which the plaintiff answered, 'then set the switch over and motion the engineer ahead.'" The words on page 266 "and that this is all that was said" purport to show that the plaintiff's statement in his testimony was such as to exclude from the conversation, his own words in asking Etzcorn "where he wanted those cars" and if the last finding of the court as to the words exchanged, as stated on page 265 had been omitted from the opinion and the final answer of the plaintiff to Etzcorn as declared to be undisputed, "then set the switch over and motion the engineer ahead" had been left as stated on page 262, the court might have relied upon these words to render inapplicable any prior order until Etzcorn had set the switch over, and as the evidence showed without conflict that Etzcorn did no such thing, the court might have concluded that until he had set the switch over, the prior orders were suspended and the plaintiff was without any direction to attempt to uncouple the cars and his entering between them for that purpose was in disobedience of orders.

Throughout the opinion there is no statement of the orders given by Bachelor or by Etzcorn, which would prevent explanation to supply all that the opinion says did not sufficiently appear in the bill of exceptions then before the court, and this explanation might be by further testimony of the plaintiff, Bachelor or Etzcorn as to words used, or by further testimony of them or either of them or others to make a further showing as to the circumstances in relation to which the words were used or indicating the meaning they ought to have. In the opinion, the findings as to what were the orders to the plaintiff and the general conclusion that he never was ordered to do what he was doing when he received his injuries, are manifestly inconsistent, unless there be an explanation that the opinion means that in the bill

of exceptions under consideration there was some material failure to show the truth that ought to be shown; that the opinion means that for aught that in such bill of exceptions appeared to the court, the plaintiff might have obeyed all the orders received without rendering the kind of service he was rendering when he received his injuries; that for aught that appeared in such bill of exceptions, the orders from the yard master Bachelor, that the plaintiff should help make up trains, might have been obeyed in the ordinary course of work without attempting to uncouple cars and that the words exchanged between Etzcorn and the plaintiff might show no more than a statement of what was to be done without containing any order or direction whatsoever, addressed to the plaintiff, or that there was something in the particular kind of service which the plaintiff was rendering when he received his injuries, or if not in the kind, then in the manner he was rendering such service, which no orders the plaintiff had received were sufficiently shown to require.

The opinion does not specify in what manner the plaintiff ought have helped to make up trains; does not specify what kind of service or manner of rendering service the order to help make up trains did extend to and include or why the kind and manner of service which the plaintiff was rendering at the time he received his injuries, was not required by any order or direction to help make up trains. The opinion does not declare why any words recited as addressed by Etzcorn to the plaintiff did not contain any direction to the plaintiff to uncouple the cars, nor does the opinion declare that the words exchanged between the plaintiff and Etzcorn contained no order whatever and contained no more than a statement of what was to be done, without requiring any assistance from the plaintiff. The opinion left the parties to conjecture as best they could, what important insufficiencies in the record there were and what the court supposed the order to help make up trains did mean to include and refer to, or what the court supposed the words exchanged between Etzcorn and the plaintiff according to either statement thereof in the opinion, did mean and whether such words included an order or included no order. The opinion left the parties to conjecture as best they could why a new trial was ordered and what insufficiencies in the record were to be supplied, and what explanations were needed or what ought to be the effect of any change by addition or subtraction in the facts and evidence recited in the opinion as the basis of the decision.

II.

The Alleged Identity of Cases.

The theories of counsel on both sides and of the Circuit Judge agree or ought to agree that on the new trial granted, evidence might so change material facts or inferences of fact or some one of them, as to render inapplicable as *res adjudicata* or as estoppels, conclusions stated in the opinion Exhibit I. It cannot be true that the law of a case wherein is no final verdict or judgment, must remain the same regardless of changes in the facts. Common sense forbids that this opinion should remain *res adjudicata* working an estoppel on the new trial, unless the case as to facts should remain substantially the same as it was declared in the opinion to appear by the record then under consideration.

A.

The counsel for Frederick Gardner respectfully insists that on the trial in the Federal Court, October 16th, 1888, the evidence in relation to the orders and directions given to Frederick Gardner showed such changes and explanations in the light of the facts and circumstances, as rendered inapplicable the conclusions in the opinion Exhibit I concerning these orders as therein recited. To the counsel for the Company the words of the opinion Exhibit I (262) "he had orders from Bachelor to help the other men make up trains" were by no means satisfactory, and in preparation for the trial in the Federal Court the deposition of Bachelor was taken on behalf of the company (201), and on its behalf was read on the trial, mainly to deny that Frederick Gardner ever did have any orders to help make up trains. No theory of the counsel for the company as to *res adjudicata* or estoppel by means of the opinion Exhibit I, hindered them in the least from vigorously attacking so much of the opinion as declared and established the orders from Bachelor to help make up trains. Mr. Bachelor on his direct examination in his deposition, positively denies the truth of the opinion as to these orders to help make up trains, and to make his denial complete he gives the very explanation which the new trial was probably granted to obtain, namely, the explanation shows that if he did give the orders to the plaintiff to help make up trains, such order would have meant and included the coupling and uncoupling of cars (203-204). The needed explanation cannot be otherwise; there was no car factory at Niles and all cars to make up trains were coming in other trains, and must be uncoupled therefrom and be coupled into the trains to be made up.

On pages 203 and 204 appears the following testimony on Mr.

Bachelor's direct examination:

Q: State whether at any time prior to the 16th day of May, before that time, 1882, your attention had been called in any way to Frederick Gardner's attempting to assist in the coupling and uncoupling of cars *in making up trains?*

A: I think not, only he got in and pulled a pin and got hurt.

Q: When was this time that he got between the cars?

A: I think in November, 1881.

Q: Did you have any talk with him at that time?

A: Yes sir.

* * * *

Q: What was that talk?

A: I told him that I didn't hire him to do that kind of work and wanted him after that to stay out of there; stay away from it altogether; to have nothing to do with pulling any pins for any body as it was not his duty.

* * * *

Q: Did you have any other conversation with him about that subject before the accident of the 16th of May, 1882, and after the time of his being hurt as testified to?

A: I think I spoke to him several times about it.

Q: Well, what did you say to him at this time?

A: I told him I didn't hire him to do that kind of work and didn't want him to do it; he wasn't paid for doing that kind of work.

Q: What kind of work did you mean?

A: Pulling pins and switching.

Q: *Helping to make up trains?*

A: Yes sir.

The cross examination of Mr. Bachelor showed extraordinary mental exercises to produce memory wherewith to assail the finding in the opinion Exhibit I, that he had ordered the plaintiff to help in making up trains (213-216-217). There can be no doubt of Mr. Bachelor's interest for himself as well as for the company to exclude the orders mentioned in the finding, but his testimony contains no intimation that any order to help make up trains would not have included the uncoupling of cars or the kind of service the plaintiff was rendering when he received his injuries, or that any such order would, for any reason, have become inapplicable at the time the plaintiff received his injuries.

Mr. Bachelor in his deposition testified positively to his authority to give the order (212) and to the equal authority of Etzcorn in his

absence (210). The plaintiff's testimony in his own behalf (80-81-82) in the Federal Court sustained by the new testimony of the witness Kemple (171-172), extended the explanation given by Mr. Bachelor and leaves no reasonable doubt that Bachelor had ordered the plaintiff to help make up trains, and that this order did require him to do what he was doing when he received his injuries. The testimony of both the plaintiff and the witness Kemple shows that Gardner did not voluntarily render the dangerous service beyond the scope of his employment and for which he was to receive no remuneration; that he, earnestly referring to the prior orders which prohibited him from rendering this very kind of service, said what he could to avoid it. The identification of the service which was required by the orders is complete. It was co-extensive with the preceding prohibition and did include the uncoupling of cars, the service that the plaintiff was rendering when he received his injuries (80-81-102-103-104-171-203-204).

B.

The testimony on all trials showed John Etzcorn to have a good position in the company's employ and willing to be its witness. On the trial in the State Court the plaintiff tried the doubtful experiment of having John Etzcorn as his witness; the printed record on which the opinion Exhibit I is based, and which the company gave in evidence in the Federal Court (78-248) showed the testimony of Etzcorn as a part of the plaintiff's evidence in the State Court, so that the company would be entitled to whatever effect this testimony as printed (43-44-45) might have to explain, qualify or neutralize the plaintiff's testimony. The deposition of Mr. Bachelor, being completed prior to any trial in the Federal Court was such, when taken together, as to relieve the plaintiff from all necessity of repeating the experiment of having Etzcorn as his witness. On the trial in the Federal Court Mr. Etzcorn was the company's witness (184) and in relation to the action of the court in taking the case from the jury, no part of the witness' testimony unless entirely uncontradicted, can lessen the effect of any of the plaintiff's evidence.

The words exchanged between Frederick Gardner and John Etzcorn just before the injuries were received were heard by no other person. Frederick Gardner testifying on the trial in the Federal Court, states the words as follows (84): "I asked him where he wanted the rest of those cars, and he said 'one in and one out.'" Again on cross examination (99) "There is where I asked him where he wanted those cars.

Q: And he said "one in and one out?"

A: Yes sir."

John Etzcorn on his direct examination in the Federal Court states the words (last lines of p. 186 and first lines of p. 187) as follows:

Q: What did he say? A: He says, "what next?"

Q: And what did you say? A: As near as I can remember I said one in and come and get the one that was right down there; one in and come and get this one.

Q: Is that all that was said? A: That is all I remember of being said.

On his cross examination (192) he testifies,—

"A: I don't remember of swearing to, one in and one out. I don't know whether that is correct or not; I don't know whether I swore to that or not; as near as I can remember now I said, "one in and come down and get that one or down to this one."

* * * *

(193) Q: If you did answer him "one in and one out" that would refer to uncoupling wouldn't it? A: Yes sir.

Q: A car that was on the train? A: Yes sir.

Q: That had not been uncoupled? A: Yes sir."

This testimony in the Federal Court by Gardner and by Etzcorn shows that Gardner did not make to Etzcorn the reply, "then set the switch over and motion the engineer ahead." That he began by asking "where he wanted those cars" cannot be neutralized or lessened in effect by reason of any thing that he or Etzcorn testified to anywhere. In the Federal Court neither of them testified that the words exchanged were limited to "what next?" and the reply by Etzcorn, "one car in and one car out"; neither of them testified "that this is all that was said;" The testimony of Etzcorn that his words were "one in and come and get the one that was right down there, one in and come and get this one" shows that it cannot be true that he "didn't ask the plaintiff to do any thing that morning; didn't ask him to help him." The words "come and get this one" would naturally mean that Gardner should get this one car by coupling to it, the engineer to aid by bringing the remainder of the train to be coupled to "this one." The words of Etzcorn taken all together could not fail to mean that he was requiring the plaintiff to render services belonging to the same kind, namely, handling cars. Etzcorn, like Bachelor, gives an explanation just such as the new trial must have been granted to obtain. He testified showing that if

his words were as sworn to by the plaintiff "one in and one out," these words would refer to uncoupling a car on the train that had not then been uncoupled (193). His statement of his words "come and get this one," extended the explanation. These words were a plain order for help in handling cars and imply that the words "one in and one out," being a part of the same sentence or direction, were also an order and naturally meant that Gardner should do the necessary uncoupling before he should "come and get this one." This implication would be no less apparent if there was but one car instead of two so to be uncoupled, and these same words remove all doubt, if any there could be, concerning the application of Bachelor's latest order to the plaintiff to help in making up trains. They informed the plaintiff what was the next work to be done and of the order in which it was to be done and that as soon as the switch was set over the plaintiff would be left without other work until he should finish handling the cars as directed to do. Mr. Bachelor was absent (84) and Mr. Etzcorn was authorized to say when the plaintiff should be without work as switch tender and render service in handling cars (190-210-212). Before the plaintiff so attempted to uncouple the car, his work with the switches had been stopped by Etzcorn; the work in handling cars became the only work left for him for some time, he knew not how long, but as a matter of fact, he had done the last work in his lifetime as a switch tender. The testimony of the plaintiff and Etzcorn in the Federal Court agreed in showing that the statement in the opinion Exhibit I of these words, what they were and what they were not, was essentially different from that which they were shown to be by the evidence in the Federal Court: First the reply (262), "Then set the switch over and motion the engineer ahead," was excluded without conflict. Second, the plaintiff's testimony that he asked Etzcorn "where he wanted those cars" was not contradicted by the plaintiff as is represented by the words, "And that this is all that was said (265)," referring to the words, "What next?" and "One car in and one car out." Third, Etzcorn's words "Come and get this one," not appearing either in the opinion Exhibit I or in the printed record before the Supreme Court of Michigan, show that Etzcorn was doing that which the opinion says he was not doing, namely, requiring the plaintiff to help him. The printed record prepared by the company and used in the Supreme Court of Michigan states Mr. Etzcorn's testimony on this subject (43) as follows: "Plaintiff spoke to him and asked him "What next?" That he, witness told him, 'one in and one out,' and came down and put this one he, witness, was riding down." One of the original printed records used in the Supreme

Court of Michigan by the company is made a part of the bill of exceptions and has the words exactly as printed on page 43 of the record now here. The words "Came down and put this one" do not purport to be addressed to the plaintiff or to give him any direction, but merely describe what Etzcorn did.

No fair statement of the orders to the plaintiff as they appeared by the evidence before the Federal Court could fail to vary substantially from the statement of the same as the opinion Exhibit I declares that they appeared to the Supreme Court. The meaning of these orders as the evidence in the Federal Court showed them to be, was such that they did require the plaintiff to render such service as he was rendering, and did not fall short of such meaning as the record before the State Supreme Court did, according to Exhibit I, have them fall short.

C.

If the evidence before the Federal Court as to what were and what were not the orders to the plaintiff had left any possible doubt whether or not they required the plaintiff to do what he was doing when he received his injuries, the evidence before the Federal Court as to certain circumstances not sufficiently appearing in the printed record before the State Court, was sufficient to remove any such possible doubt. The printed record used in the State Supreme Court did not show that the words of Bachelor as sworn to by the plaintiff (29) were true, these words being, "That leaves John Etzcorn alone and he cannot do the work alone; I want you to help him." The printed record used in the State Court, shows no evidence as to whether or not there was in fact such want of men to do the service as would naturally explain why Gardner should do the work, and what the words addressed to him meant. This evidence was fully supplied in the Federal Court by the defendant's witness Etzcorn (189) were the following questions and answers appear on his cross examination:

"Q: So you were the sole man up there at the time this accident happened, to do all the coupling and uncoupling, were you? A: Yes sir.

Q: You didn't need any help did you, you didn't think of having any help? A: Well, I didn't expect any; the way I had been working, the best I could. We did all the work we could, what we couldn't do we left for some one else to do.

* * * *

Q: Wasn't the most of the work just about that time in the

morning, wasn't there more to do at that time in the morning than there were other hours in the day? A: There was more work in the morning than in the evening.

Q: That was the busy time? A: Yes sir.

Q: Wasn't there several trains to be made up at that time, that needed quite a good many cars at that time? A: Yes sir.

Q: A great deal of coupling and uncoupling of cars to be done at that time? A: Yes sir."

D.

The printed record used in the State Supreme Court did not show as did the evidence on the trial in the Federal Court, and appearing in the record now here, that at the time the words were exchanged just before the injuries were received, Etzcorn was on top of a moving car going westward from Fifth street toward Fourth street, and that he had nearly reached Fourth street and was still on top of the car, at least twelve rods away from Gardner when the injuries were received, so that Gardner would naturally understand the words exchanged to mean that he was to do the uncoupling, because Etzcorn was going west on top of a car and Gardner was the only yard man left to do such uncoupling. The plaintiff's testimony has questions and answers as follows (last lines of 83):

"A: John Etzcorn had just gone to cut one off and was on top of them.

Q: How far west of Fifth street was he then? A: Well, only about a couple of rods when I hollered to him, when I asked him

Q: What did you ask him? A: (84) I asked him where he wanted the rest of those cars, and he said *'one in and one out.'*

Q: This is John Etzcorn, the night yard master? A: Yes sir.

Q: Mr. Bachelor hadn't yet come? A: No sir.

Q: Well, when he said 'one in and one out' what did you do then?

A: I went and set the switch over for the freight house track; then I went back up along the cars and was going to cut the first car off; it was a blue; I have forgotten the number of it; it was about, I should judge, eight feet above the crossing.

Q: Which way? A: East of the crossing.

Q: East of the Fifth street crossing? A: Yes sir.

Q: On which track was it? A: On the south track.

Q: How many tracks were there crossing Fifth street there then? A: Five.

Q: This was the one furthest south? A: Yes sir.

Q: This car you say was about eight feet from the crossing?

A: Yes, the east end was or the east end of the car was about eight feet.

Q: From what? A: From the crossing.

Q: East of the crossing? A: Yes sir, the east end of the car.

Q: It was in motion? A: No sir.

Q: Standing still then? A: Yes.

Q: Well, then what? A: After I set the switch over I went up along and hollered to them to come ahead.

Q: Did you make any signals to them? A: I made a signal like that (indicating by swinging arm) to come ahead after I hollered. At first they came very slow, and I stepped in to pull the pin.

Q: Which way was you facing? A: I was facing west.

Q: Which way was the engine facing? A: West.

Q: The cow-catcher on it was turned west? A: Yes.

Q: And you were facing west? A: Yes.

Q: They were pushing the cars west? A: Yes.

Q: How many cars were there on that whole train? A: Five.

Q: Now what happened next? A: After I stepped in and took hold of the pin, to pull it up it didn't come very easily; I had to give it several motions to get it loose; I got it off. Then I think I laid it upon the deadwood; I laid it up there ready to step out. I took my left foot and stepped right up near the rail so I could bring my right foot around, because I would have to get out and as I went to bring my right foot it wouldn't come. I stopped and looked down and I seen it was in the hole.

* * * *

Then I took my left foot and set it right on top of the rail, thinking probably I could get it out in time, and at the same time I found it was fast. I commenced hollering and swinging my hands like this (indicating) until I fell on the ground as though it pushed me down. Mr. Etzcorn at that time heard me holler; he was then pretty near to Fifth street, on top of the car.

Q: About how far was he off? A: He was about ten or twelve rods from me."

On cross examination (90-91),—

"Q: What prevented you from getting a hold onto that ca.? Did you try to hold onto it at all? (meaning the blue car uncoupled)?

A: I did; when I saw my foot was fast, I tried to grab it to see if I could hold myself, but I was too far gone; I couldn't reach it.

Q: Then which way did you fall? A: I fell to the north.

Q: To the north or northwe t it was? A: To the north.

Q: You threw yourself as much as you could? A: I threw myself as much as I could to the north, as much as I could with the right hand."

Mr. Etzcorn, the company's witness, on his direct examination (136) testifies:—

Q. Had you looked for any body to assist you in doing it (coupling and uncoupling) with reference to those cars at that time?

A. *Not in particular, no sir, not that I know of.*

Q. Who threw off the first car? A. I did.

Q. Where did you take it? A. Down the south track.

Q. *Did you get on top of the car?* A. *Yes sir.*

Q. Did you become aware at any time that morning that Mr. Gardner was about the yard? A. I did.

Q. When? A. Shortly after I cut off that one I cut off.

Q. Where were you? A. I was right there on the south track; either there or on the car, I don't recollect.

Q. Did he say any thing to you? A. He did.

Q. What was it? A. The first I noticed of him, he was a little west—north of me.

Q. How far west from Fifth street crossing? A. Well, i couldn't say exactly,—couple of rods; probably a couple or three rods as near as I can remember, and about the same distance north of the south track.

Q. (Showing witness paper,—see map at page 248). Which do you call the south track? Do you recognize that? A. Yes sir.

Q. Which is the south track: A. It—this one; this is the south track (indicating).

Q. Where were . . . when you first became aware of Mr. Gardner's presence, with reference to this track? A. Somewhere between this switch and this crossing.

* * * *

Q. Now what was said—who spoke the first word at that time? A. Mr. Gardner.

Q. What did he say? A. He says, "what next?"

On cross examination (193) Mr. Etzcorn testified as follows:

Q: Now sir, didn't you further testify on the trial in words following, after giving your answer, "that you came down there and put the one he (witness) was on right down there; then as near as you can remember, as I rode that car down to the freight house track, he heard him holler; witness jumped down and ran up there and saw

him lying on the crossing hurt." Didn't you testify that way at Berrien?

A. I think I did.

Q. Then you were on top of the car when you heard him hollering wasn't you? A. I don't remember exactly now, I was either on top of the car or near the car or getting down.

Q. If you testified that you were on top of the car at the trial in Berrien in 1884 it is probably true isn't it? A. Yes.

Q. If you did testify that way you have no doubt but you was on top of the car when you heard him holler?

A. No sir, I have no doubt but I was on top of the car.

Q. And the hollering that you heard was his screaming when he was hurt? A. Yes sir.

Q. Did he scream more than once? A. I don't remember.

Q. Now sir, wasn't his question to you, instead of "What next?" "Where do you want those cars?" A. No sir.

Q. Or "What is to be done with the other cars?" A. No sir, all I can remember is "What next?" *Those are all the words I remember of him saying.*

Q. You had known Mr. Gardner coupling and uncoupling cars before that hadn't you. A. Yes sir.

Q. Hadn't you known of his doing it within a very few days before that accident? A. I don't remember how long it was, *but he had been doing it.*

E.

The printed record used in the State Supreme Court did not show that John Etzcorn, after the exchange of words between him and Gardner and while he was on the moving car, signaled Adolphus Waltz, the engineer to commence pushing the cars westward sufficiently for the uncoupling to be done. The evidence in the Federal Court shows that Etzcorn saw and knew that Gardner was ready to do the uncoupling as he had been doing it for some time previously, and further saw and knew that Gardner was the only yard man left to do the uncoupling for which the cars were set in the ordinary motion; that the engineer paid no attention to any signal given by Gardner, and that whatever signals he obeyed, were given by Etzcorn.

Mr. Etzcorn on his direct examination in the Federal Court testified as follows (187):

Q. Did you tell him (Waltz) who wanted him? A. No sir, I

just told him we had some work to do; then they go according to signals.

Q. When was the first you knew that somebody was hurt that morning?

A. I can't recollect whether I had gone down off of this car that I had cut off or whether I was on top of the car.

Q. Well, what was the first evidence you knew of somebody being hurt?

A. I heard some hollering, screaming and hollering, and I got down and swung the engine off and saw Mr. Gardner on the crossing.

Q. You saw Mr. Gardner looking down the track?

(Objected to as leading.)

Q. (188) State what you saw the engineer do, whether you caught his eye or not? A. I don't know whether I did or not; I gave signals.

Q. Who did you give them to? A. They were intended for the engineer; I don't remember whether he was looking towards me.

Q. Well, do you know whether the signals were at once obeyed? A. I think they were, yes sir."

Adolphus Waltz, the Company's witness testified in the Federal Court as follows (233):

Q. Who moved those cars and switched them about? A. Mr. Etzcorn.

Q. Any body else? A. No sir.

Q. Did you see Mr. Gardner that morning? A. No sir.

Q. Do you know him? A. Yes sir.

* * * *

Etzcorn was the only man that talked; he was the man I got my orders from; I didn't take them from any body else.

Q. Did any body else undertake to give you any that morning? A. No sir.

III.

Important Subtractions from and Additions to the Case as Stated in Exhibit I.

In relation to matters other than orders or instructions to the plaintiff herein before mentioned and the meaning and effect thereof, the evidence on the trial in the Federal Court was such as to produce most important changes in the facts of the case, referred to in the opinion, Exhibit I as its foundation.

A.

The opinion Exhibit I states in its findings of facts duly appearing and uncontroverted, that the hole mentioned in the declaration was seven or eight inches long and between three and four inches wide. It is described as in the surface, its depth not being given (261) and is further described as "so small as to escape the notice of all persons in the yard except two," and that "even the two persons who did see it did not deem it of sufficient importance to report it to the yard master or repair it themselves; it being their duty to do so if it was dangerous" (263).

On the trial in the Federal Court October 16th, 1888, the plaintiff produced testimony, admitted without objection, that the hole was more than a foot in length; that its depth was the height of the rail; that the crushed parts of the plank had been removed, leaving the open hole, about four inches wide at the east end and narrowing as it extended westward (153-154-169), and that a man's foot would easily go into it.

B.

The opinion Exhibit I states in its finding of facts duly appearing and uncontroverted, that the hole mentioned in the declaration was made "at some time previous to the morning the injury occurred to plaintiff (the exact time however is not shown by the record)" (261). * * * "There is no evidence that the Company had actual notice thereof (263)." On the trial in the Federal Court the plaintiff produced testimony admitted without objection, that the hole was made more than a month before the plaintiff received his injuries (154-174). This was in connection with the uncontroverted fact that the Company itself caused the hole by means of John Lino, assistant yard master, meeting with an accident in the line of his duty, and therefore the Company had actual notice in like manner as if the hole had been a defect in construction by some other servant of the Company in the line of his duty, and was also effected with constructive notice by reason of the length of time that the hole in the planking of a street which was a thoroughfare near to the Company's passenger station, lay unrepaired through gross negligence.

C.

The opinion Exhibit I states in its finding of facts duly appearing and uncontroverted, "It further appears that it was the duty of the yard men to examine and make discovery of any defect in the planking or any other places in the yard at once, and repair the same and

call on the track master for the necessary materials for that purpose when they were not on hand at the station (261). * * * (264) Especially is this true in this case under the cirsumstances disclosed in this record, for it is shown to have been a part of the duty of the plaintiff to have discovered the defect in the planking complained of and to have repaired the same, as well as that of the track master." On the trial in the Federal Court the Company did all it could with the deposition of Mr. Bachelor to take out of the case "The orders from Bachelor to help the other men make up trains (262)," declared by the opinion Exhibit I to be in the case. As to these orders the deposition could do no more than make a feeble attempt to contradict the plain evidence, direct and circumstantial, on behalf of the plaintiff. The plaintiff's counsel made no objection to the Company's right to make this attempt, but did insist on an equal right for Frederick Gardner to take out of the case certain facts and inferences of fact set forth in the opinion Exhibit I, for its conclusions to rest upon as their foundation, and without objection and without contradiction any where on the trial, the following questions and answers appear in Mr. Bachelor's cross examination (219):

Q. It wasn't your duty to look after the condition of the planking in Fifth street? A. No sir.

Q. Whose duty was it? A. It was the road master's to see it was in proper order.

Q. Who was the road master? A. George Doliver.

The Company produced George Doliver, the road master as a witness on the trial in the Federal Court and his testimony was the same as in the printed record used in the State Court (247) except that on his cross examination, the following testimony appears:

Q. Mr. Doliver, you speak of different departments there; Mr. Bachelor's department was a different department from yours wasn't it?

The witness answered, "Yes sir."

Said counsel for the plaintiff continues: Q. What was his department?

Whereupon Mr. N. H. Stewart, counsel for the defendant said:

"That already appears; what is the use of taking up time."

The counsel for the plaintiff said:

"Well then—" and said counsel for the defendant interrupting said, "It is conceded."

Said counsel for the plaintiff continued, "That the departments were different:" to which said counsel for the defendant replied, "Why certainly."

Said printed record used in the State Court states that this witness

(55) "is called a division track man or road master, his title; his duty, to keep the road bed and all things on his division in as good possible repair as can be done."

The Company did not succeed in its attempt to take out of the case the orders to help make up trains. The plaintiff did succeed in taking out of the case without conflict of testimony, objection or resistance of any kind, all that appeared or could have appeared in the printed record used in the State Court to show that it had been at any time, "A part of the duty of the plaintiff to have discovered the defect in the planking complained of and to have repaired the same, as well as that of the track master." George W. Doliver and the track men in his employ were of the department to provide appliances; Edwin D. Bachelor, the yard master and the yard men in his employ were of the department to use the appliances provided, and it was not their duty to examine and make discovery of defects in the planking or to repair the same. All facts and inferences of fact which caused the declaration of this duty to go into the foundation of the opinion Exhibit I, or to appear as its corner stone, went out of the ca e by consent and without objection on the trial in the Federal Court.

D.

The opinion Exhibit I has words as follows (263): "It would seem that the defendant had done its whole duty in the premises, and it is quite clear, I think, that the only ground upon which the plaintiff can rest his claim must be that of negligence of a fellow servant engaged in the same employment." These words are inseparably connected with those which declare the plaintiff's duty to be, as well as that of the track master, George Doliver, to examine, discover and repair the hole.

The opinion Exhibit I does not specify what part or parts of the printed record used in the State Court, showed this duty, and it matters not here whether or not any such parts can be found. The duty, if it existed, was a fact which the evidence on the new trial granted, might take out of the case, and by uncontroverted evidence and by consent of parties this duty did go out of the case entirely on the trial in the Federal Court. With this duty in the case as an uncontroverted fact, the plaintiff and George Doliver were fellow servants; with it out of the case they were not fellow servants, and all of the opinion Exhibit I which depends on their being fellow servants is left without force as *res adjudicata* and is no more obligatory than a decision in one case is obligatory in a very different case. The Circuit

Judge directed the case to be taken from the jury because the opinion Exhibit 1 seemed to him to show that the Supreme Court of Michigan reached two conclusions: First, that the defendant was not guilty of negligence; Secondly, that the plaintiff was (267). If the defendant was not guilty of negligence, by no possibility could the plaintiff's negligence be of any importance. If the defendant was not guilty of negligence, it cannot be liable to the plaintiff, and certainly no negligence on his part could affect any claim of his, for he would have no claim at all and all parts of the opinion Exhibit 1, concerning the plaintiff's negligence can be no more than *obiter dicta*.

St. Louis R. R. v. Terre Haute R. R., 145 U. S., 403:—"Upon questions discussed in the opinion and not necessary to the judgment or not considered at all, the case cannot be regarded as a decision, because as observed by Mr. Justice Curtis, speaking for this court, 'To make it so there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties.' Carroll v. Carroll, 16 How., 275-287."

Further the record now here shows that there must go out of the case in the Federal Court material facts and inferences of fact that were in it in the State Court; the effect of this subtraction, especially the subtraction of the plaintiff's duty to examine, discover and repair the defect, extends so far under the conclusions set forth in the opinion, that the conclusions as to the negligence of the plaintiff become inapplicable by reason of a substantial change of facts. If it had been the duty of the plaintiff as well as of the track master, George W. Doliver, to examine, discover and repair the defect, this must have been by reason of construction of orders given, and he would have been disobeying these orders by leaving the hole for more than a month unrepaired. He would have been disobeying these orders by attempting to uncouple cars as he did, at the place where his disobedience had left the hole unrepaired. It would have been true that to attempt to uncouple cars where by his negligence the hole existed, he would have been attempting to perform a hazardous kind of service in open violation of orders and without direction from any one, as declared at the end of the opinion. This final statement of conclusions (265) commences with the words, "It clearly appears by the record," and ends with the words, "Upon the facts appearing in this record." The part of the finding of facts which had the most controlling effect throughout, is the finding that Gardner's duty was in kind the same as that of the track master Doliver, and it cannot be reasoned fairly that with this supposed duty out of the case; the final conclusions would ever have existed.

The opinion Exhibit I shows that the plaintiff's supposed disobedience of orders requiring him to find and repair the hole, must have been deemed extraordinary, for the opinion states that the undisputed proofs show that the plaintiff "Was daily within ten or twelve feet of it (the hole) from once to a dozen times a day." The plaintiff's testimony in the Federal Court, admitted without objection, presented legal evidence on this subject, very different from the alleged undisputed proofs which the opinion Exhibit I is founded upon. On the plaintiff's direct examination in the Federal Court the following testimony appears (89):

Q. Now about this switch that was nearest to the hole; how near was the nearest switch that was nearest to that hole; how near was it to the hole? A. Twenty feet.

Q. Did you ever measure it? A. Yes sir.

Q. Is the handle of the.....that you took a hold of to move that switch south of the track or north of it? A. It is south of the track.

Q. South of the southermost track? A. Yes.

* * * *

Q (90). And immediately from the nearest part of the rail, the nearest part of the rail to the handle that you took hold of, how many feet was it when you were taking hold of the handle and looked at the nearest piece of the rail you could find,—how near was that?

A. The nearest, it wasn't six feet off, right straight.

Q. It was right north of you when you took hold of the handle: A. Yes sir.

Q. If you had looked over to where this hole was, state whether you would have to look across two rails? A. Yes, I would have to look across two rails; it was twenty feet.

Q. Now, that switch that was so situated, was it frequently or uncommonly used while you were on duty in the night? A. It was hardly ever used in the night when I was on duty.

The plaintiff on his cross examination in reference to this same switch testified as follows (101):

Q. How frequently did you use this switch Mr. Gardner, at this point? A. I don't know as I ever used it while I was on duty nights.

Q. You never did eh? A. Not that I know of.

On further cross examination the plaintiff testified as follows (114):

Q. I understood you to say yesterday that you didn't handle it (meaning this switch)? A. I didn't.

Q. You hadn't handled it? A. I didn't handle that switch for some time to my knowledge.

On re-direct examination the plaintiff testified as follows (118):

Q. You were asked on your cross examination about a light on this switch. What kind of light is that, the usual light for switches? A. It is a switch light to give signals for trains, whether it was right or wrong.

Q. Would that shed any light for fifteen or twenty feet so you could see any thing? A. No sir.

IV.

The Claim that if the Findings of Fact and Recitals of Evidence in the Opinion Exhibit I Cannot be True, Nevertheless all of its Conclusions Must Remain Infallible Adjudications Against Frederick Gardner on any True Finding of the Facts in his Case.

The Company defendant can gain nothing by any contention that the opinion Exhibit I or any part thereof, is not supported by the printed record therein. If one party can successfully make such contention, so may the other, and this opinion, as well as opinions in other cases, would be liable to change by reason of such contention. The opinion would cease to be *res adjudicata*, having conclusive effect, and Frederick Gardner would have a right to change any part of it that he could show to be based on a misunderstanding of the record.

A.

The Company defendant can gain nothing by any contention that the printed record used in the State Supreme Court was unsupported by the stenographer's report of the trial in the State Circuit Court. The Supreme Court of Michigan never saw the stenographer's report; it was no part of the return to any writ of error by any law or practice of the State of Michigan, and never was in the State Supreme Court at all. The only record referred to in the opinion Exhibit I is that used on the hearing in the State Supreme Court and made Exhibit H in the bill of exceptions now here (78). The Company defendant prepared the printed record Exhibit H and thereby obtained the opinion Exhibit I and is estopped from any attempt to use said stenographer's report (78-119-248).

If the Company contends that the printed record Exhibit H or the

stenographer's report Exhibit A might or ought to have caused facts, inferences of fact or evidence to have appeared otherwise than as stated in the opinion Exhibit I, and that all this would not have changed any conclusion in the apinion, Frederick Gardner respectfully insists that all this would have caused the conclusions to change; that if the Justices of the State Supreme Court had known that the appearances stated in the opinion were unsupported by the record and were false, they would have remembered a maxim of high authority, "Judge not according to appearance, but judge righteous judgment." Frederick Gardner insists that the opinion states its findings of fact, inferences of fact and recitals of evidence on which its conclusions depend; that it contains no adjudication that he must be beaten at all events. Something equivalent to such an adjudication the Company defendant is desirous to find in the opinion, but any adjudication having such final effect would be inconsistent with the order for a new trial, and would have rendered such order nugatory and absurd; that the order for a new trial was given that he might if possible, controvert whatever the opinion declares that he had left uncontroverted and to cause facts, inferences of fact and evidence to appear otherwise than as the opinion declares that the printed record Exhibit H did cause them to appear. (78)

V.

Some Points and Authorities.

No negligence of any person other than the plaintiff himself can be of any avail to the defense in this suit. Frederick Gardner had no duty to examine or repair any street crossing, and he, when he received his injuries, was obeying orders to do dangerous work, outside of his safe employment as a switch tender (32-129-202-203).

Northern Pacific Railroad Co. v. Herbert, 116 U. S., 647 to 651.

Cited and followed in,—

Morton v. Railroad Co., 31 Mich., 431 to 435.

See also Palmer v. M. C. R. R. Co., 53 N. W. Rep. 397 (—Mich.—)

Rorer on Railroads, Vol. 2, page 1210 and cases there cited.

Gardner v. Railroad Co., 58 Mich., 584, qualified and explained in

Van Deusen v. Letellier, 78 Mich., 505, and

Ashman v. Railroad Co., 90 Mich., 568.

Effect of the verbal orders to Gardner;

Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich., 211.

Negligence:—

Grand Trunk R. R. Co. v. Ives, 144 U. S., 417:—"It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered as one of law for the court."

Same case, p. 429:—"The contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. Seaboard Coasting Co. v. Tolson, 139 U. S., 551-558, and cases cited."

To like effect:

Grostick v. R. R. Co., 90 Mich., 610-611.

Hayes v. Homer, 36 Mich., 376.

G. R. & I. R. R. Co. v. Judson, 34 Mich., 507.

Certainly there was evidence which Frederick Gardner was entitled to have submitted to the jury, notwithstanding all that could be claimed because of alleged contributory negligence, and the burden of proving contributory negligence was on the Company defendant.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S., 557-558 and cases there cited; especially

Indianapolis etc. R. R. Co. v. Horst, 93 U. S., 299.

Wash. & G. R. R. Co. v. Gladmon, 15 Wall., 401.

Retan v. L. S. & M. S. Ry. Co., 53 N. W., Rep. 1096 (—Mich—.)

Construction of order for new trial.

In Mynning v. D. L. & N. R. R. Co., 67 Mich., 678 are the following words of the court: "When the case came before us again we held that, by the plaintiff's own showing the deceased was chargeable with such contributory negligence as precluded a recovery (Mynning v. D. L. & N. R. R. Co. 64 Mich., 93) and the case was sent back for a new trial.

Ordinarily where the plaintiff has failed to make a case *by reason of its affirmatively appearing that the deceased was himself guilty of contributory negligence, a new trial is not ordered;* but it appeared in the record in this case that another person by the name of Coburn witnessed the catastrophe who was not called as a witness, and whose testimony might possibly have aided the plaintiff in showing due care on the part of the deceased, and therefore we ordered a new trial."

IN THE

SUPREME COURT

OF THE UNITED STATES.

—o—

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

—o—

FREDERICK GARDNER,

Plaintiff in Error,

VS

THE MICHIGAN CENTRAL RAILROAD COMPANY,

Defendant in Error.

—o—

SUPPLEMENTAL BRIEF

For Plaintiff in Error, and Reply as to some Matters in the Brief of Mr. Ashley Pond.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF MICHIGAN.

FREDERICK GARDNER, PLAINTIFF IN ERROR,

VS.

THE MICHIGAN CENTRAL RAILROAD COMPANY,

DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Index of material differences in the presentation of this case between the printed record used in the Supreme Court of Michigan and in this index indicated by the word "State" and the printed record to be used in this Court in this index indicated by the word "Federal." The figures, unless it is otherwise stated, indicate pages of the printed record for this Court.

Witnesses and exhibits in the State Court and not in the Federal Court.

STATE	FEDERAL.
For Plaintiff : D. B. Cook, Charles Ream. For Defendant: John Young. Exhibit A—Report of F. Johnson, p 72. Exhibit B—Report of John Etzcorn, p 73, Map exhibit C mentioned p 47, ~~mentioned~~ in printed record exhibit H.	omitted

Witnesses and exhibits in the Federal Court and not in the State Court.

STATE.	FEDERAL.
	For Plaintiff: Jacob Kemple, Nancy Shockley, William Metcalf, Albert Buck. For Defendant: Adolphus Walsh, George Johnson. Exhibits—Map exhibit V p 248 Defendant's Act of Incorporation, p 184. Exhibit E—Rules of the Defendant, pp 257, 258, 247, 248. Exhibit H, p 78, State Court printed record. Exhibits F, G, I, pp 259, 260. Evidence of proceedings in the State Court.

Copies from stenographic report of the trial in the State Court, setting forth at large testimony summarized not printed in full in the printed record exhibit H p 78, and never filed or used in the State Supreme Court and never printed prior to 1893.

STATE.	FEDERAL.
	Exhibit A-1—Testimony of Fred Gardner, p 119. Testimony of John Line, p 161. Testimony of John Etzcorn, p 195. Testimony of E. D. Bachelor, p 221.

John Etzcorn, the defendant's night yard master, was in the State Court the plaintiff's witness—p 43. He was not called by the plaintiff and was the defendant's witness in the Federal Court—pp 184. 185.

Incompetency of Apprentice Engineer, Adolphus Walsh.

STATE.	FEDERAL.
Nothing on this subject.	Pages 156, 176, 178, 180, 181 239, 240.

Negligence of Apprentice Engineer Adolphus Walsh and its results.

STATE.	FEDERAL.
Nothing on this subject.	Pages 8, 9, 10, 85, 86, 87, 246.

Lowness of brake beam mentioned in the declaration and additional injuries thereby.

STATE.	FEDERAL.
Nothing on this subject.	Pages 9, 10, 86, 87, 155, 206.

The plaintiff hired as switch tender; no uncoupling of cars within the limits of his employment.

STATE.	FEDERAL.
Imperfect statement, pp 29, 56.	Perfect statement, pp 79, 80, 185, 202, 203, 205, 209, 211.

The alleged duty of the plaintiff to find and repair the trap-hole mentioned in his declaration, pp 261, 264.

STATE.	FEDERAL.
Words of defendant's road master, Geo. Doliver: "We have yard men and it is their business to look around and see where there is a defect and repair it. If they have not got the material they come to me"—p 56.	Disproved without conflict of evidence. True explanation of the words of Geo. Doliver, pp 41, 49, 55, 89, 201, 202, 219, 247.
These words are in the printed record used in the Michigan Supreme Court left unexplained so that said Court believed the plaintiff to be one of the yard men referred to, whereas, these were the men under H. G. Serrine, foreman of track repairs at Niles—pp 261, 264.	Frederic Gardner, the plaintiff, testified, p 49: Q. Had you seen this 5th street crossing—before you were hurt had you seen it—did you know that crossing? A. Yes, sir; I knew the crossing. Q. About how often was that crossing cleaned off? A. About twice a week. Q. Who attended to it—whose men? A. Serrine's men. Q. Were you ever employed by Serrine at all, or by Doliver? A. No, sir. Q. Did either of them ever

give you any instructions?
A. No, sir.

See first lines p 89

Edwin D. Bachelor, defendant's yardmaster and witness, testified, p 201:

Q. What were your duties as yardmaster?
A. Supervision of all yard work—making up trains and charging men.
Q. What men?
A. All yardmen, all switchmen, and yardmen with the making up of the trains.

* * * *

(202) He (meaning the plaintiff) left the freight house to go to work for me in the yard.

* * * *

Q. What was the character of the employment you gave him?
A. Tending switches in the east end of the yard at Niles.

* * * *

(219) Q. It wasn't your duty to look after the planking in 5th street?
A. No, sir.
Q. Whose duty was it?
A. It was the roadmaster's duty to see it was in proper order.
Q. Who was the roadmaster?
A. George Doliver.
Q. About how many men did he have as assistants or employes under him who might look after the condition of the planking in the line of their duty?

A. I think there was a foreman had a gang of men that looked after the yard.
Q. Who was the foreman?
A. I cannot tell the foreman's name.
Q. How many did he have?
A. Well, about five I should say, or six.
Q. What was their business?
A. To keep the yard up and to look after the crossing, and so on.

Geo. W. Doliver, the defendant's roadmaster and witness, (p 247):
Q. Mr. Doliver, you speak of different departments there; Mr. Bachelor's department was a different department from yours, wasn't it?
The witness answered "yes, sir."

Departments of Roadmaster Geo. Doliver and Yardmaster Edwin D. Bachelor very different.

STATE.	FEDERAL.
Nothing on this subject.	Proved and admitted, p 247.

The allegation that the length of the hole was seven or eight inches, pp 261, 262.

STATE.	FEDERAL.
This allegation is taken from the testimony of Geo. W. Doliver and M. D. Gregg, defendant's officers and witnesses, pp 55, 60, and was by the Michigan Supreme	Direct testimony that the length of the hole exceeded one foot, pp 153, 154, 169.

Court believed to be left uncontradicted.	

The allegation of the smallness and unimportance of the hole, pp 261, 263.

STATE.	FEDERAL
Pages 50, 56, 59, 60.	Direct testimony that the hole was dangerous, p 160; see also 49, 59, 247.

See testimony of H. F. Serrine, defendant's foreman of track repairs under Geo. Doliver, p 49 :

"Also heard the testimony of Mr. Cook and Mr. Shockley; saw them place their feet in that (the hole)."

George Doliver, defendant's roadmaster and witness, p 59 :

"Yes, sir; it is a bad hole if a man gets into it."

By stipulation, page 247, the above copied testimony of these two witnesses made the same in both courts.

The allegation that the evidence before the State Court left the defendant unaffected with notice of the hole, either by length of time it had existed prior to the time the plaintiff received his injuries or otherwise; pp 261, 262, 263.

STATE.	FEDERAL.
Defective and uncertain statement of time of existence of the hole before the plaintiff was injured, pp 41, 43.	Uncontradicted evidence that the hole existed more than a month before the plaintiff was injured, pp 154, 158, 174

The business office of Yardmaster Bachelor was very near

to the hole.

STATE	FEDERAL.
~~Nothing on this subject.~~ 46	Pages 167, 168.

Fifth street a thoroughfare. Map

STATE.	FEDERAL.
Imperfect evidence.	See Map 248.

Cleaning away from the hole crushed fragments of plank by defendant's assistant yardmaster, John Lino.

STATE.	FEDERAL.
Denied, pp 56, 59.	Proved, pp 154, 158.

H. Serrine, foreman of track repairs at Niles, in the line of his duty, caused the planking where the hole was, to be cleaned every second or third day.

STATE.	FEDERAL.
Evidence, p 58.	Pages 175, 219, 89.

The allegation that the defendant had done its whole duty, p 263.

STATE.	FEDERAL.
Defective and ambiguous evidence, pp 41, 43, 56.	Disproved without conflict of evidence, pp 153, 154, 169.

The words of the opinion Exhibit I, that the plaintiff was daily within 10 or 12 feet of it (the hole) from once to a

dozen times a day, p 263.

STATE.	FEDERAL.
Defective statements of plaintiff, p 32.	Disproved without conflict of evidence, pp 90, 101, 102, 114, 115, 220. Frederick Gardner, the plaintiff, testified, p 90: Q. If you (holding the handle of the switch nearest to the hole) had looked over to where this hole was, state whether you would have to look across two rails? A. Yes, I would have to look across two rails; it was 20 feet. Q. Now that switch that was so situated, was it frequently or uncommonly used while you were on duty in the night? A. It was hardly ever used in the night when I was on duty. * * * * (101) Q. Did you use this switch at all? A. I didn't; at night the other men did; when there were cars to put in they used it. * * * * Well, I cannot swear positively when I used it, but I know I didn't use it for a long time before I was hurt. (114) I didn't handle that switch for some time to my knowledge. * * * * (115) I have no recollection of using that switch because it

wasn't my business down there to attend to that switch; I generally handled the switch at the west end of the crossing; that was the switch I handled that morning, but the switch at the east end I didn't handle.

Edwin D. Bachelor, the defendant's yardmaster and witness, testified, p 220:

Q. About how far east of Fifth street did the Niles yard extend in the spring of 1882?

A. About half a mile, I should think; nearly that; I couldn't tell.

* * * *

Q. Now about how many switches were there east of Fifth street in the spring of 1882 for Gardner to attend to?

A. Well, probably a dozen switches, may be.

Q. How many?

A. Oh, a dozen, I should think, that he had charge of there; may be more.

Frederick Gardner testified, p 79:

Q. How far does that yard extend east of Fifth street?

A. Over a quarter of a mile; then it extends; some tracks run about a quarter of a mile further; *it makes about a half a mile that I tended.*

Hiding of the hole by cars over it.

STATE.	FEDERAL.
Nothing on this subject.	Pages 97, 99, 106, 116, 160.

The plaintiff without notice of the hole, pp 94, 95, 79.

Explanation that any orders of Edwin D. Bachelor to the plaintiff to help make up trains would include the uncoupling of cars.

STATE.	FEDERAL.
Evidence of the order without explanation, p 29.	Full explanation, pp 80, 81. 82, 103, 185, 201, 203, 204. Edwin D. Bachelor, defendant's yardmaster and witness, p 203: "I told him I didn't hire him to do that kind of work and didn't want him to do it; he wasn't paid for doing that kind of work. Q. What kind of work did you mean? A. Pulling pins and switching. Q. Helping to make up trains? A. Yes, sir. See plaintiff's brief, pp 11, 12, 13.

Need of plaintiff's help by reason of want of men.

STATE.	FEDERAL.
Stated as hearsay, pp 29, 39.	Full statement of facts, pp 188, 189.

The order to help in making up trains included uncoup-

ling of cars in like manner as the previous order not to help make up trains forbade it, 80, 81, 171.

STATE.	FEDERAL.
Defective statement, pp 29, 30.	Perfect statement and explanation, pp 171, 80, 81, 82, 185, 203, 204.

The authority of John Etzcorn, night yardmaster, to order the plaintiff to uncouple cars.

STATE.	FEDERAL.
Imperfect statement, pp 45, 55.	Full proof, pp 79, 190, 191, 210, 231.

The words exchanged between John Etzcorn and the plaintiff on the morning that the plaintiff received his injuries; plaintiff's brief, pp 13 to 16.

STATE.	FEDERAL.
John Etzcorn, as the plaintiff's witness, has, in his testimony, p 44, words as follows: "Had not asked of plaintiff that morning any assistance as he remembered; thinks he would have uncoupled these cars himself if plaintiff had not; it was a part of witness' duty; had not required the services of the plaintiff in any capacity and had not asked him to help him that morning. * * Witness himself was to do this work, switch and couple cars up to this time." Agrees with plaintiff that he,	John Etzcorn, as defendant's witness, materially changes his testimony in the State Court and has the words "one in, and come and get the one that was right down there, one in and come and get this one," pp 192, 196, 198. He further testifies, p 193, that if he did use the words "one in and one out," these words would imply a direction to the plaintiff to uncouple the cars that he was uncoupling when he received his injuries. He further testifies, as he never had before, that he had stated

Etzcorn, used the words "one in and one out," p 43, 30. Contradicts the plaintiff as to the words "I asked him where he wanted the other," p 30. "Asked him where he wanted those cars," p 33. and put in place thereof, "What next?" insisting, as above appears, that no assistance was requested, thus contradicting the plaintiff materially.	all the words that were exchanged.

The allegation in the opinion, p 262, that the plaintiff said to Etzcorn, "Then set the switch over and motion the engineer ahead," is unsupported by any testimony in either court, and in some mysterious way came from the words in Etzcorn's testimony, p 43, "and came down and put that one he, witness, was riding down." See plaintiff's brief, pp 14, 15.

John Etzcorn's words to the plaintiff explained by him to include a direction to uncouple cars.

STATE.	FEDERAL.
No explanation.	Direct explanation by John Etzcorn, p 193.

Circumstantial evidence explaining John Etzcorn's words to direct the uncoupling of cars by the plaintiff; plaintiff's brief, pp 16, 21.

STATE.	FEDERAL.
Uncertain statement.	Distance of Etzcorn from plaintiff about 12 rods; pp 83, 84, 85; Map, 248.
Imperfect statement.	Etzcorn on top of a car moving away, pp 83, 84, 193.

Nothing on this subject, pp 43, 44, 45.	Signals by Etzcorn to be followed by the uncoupling of cars; full statement; pp 187, 233.

Plaintiff the only man left to do the uncoupling.

STATE	FEDERAL.
Not proved.	Fully proved, pp 186, 188, 189.

The words of the opinion exhibit I, "It is quite clear, I think, that the only ground upon which the plaintiff can rest his claim must be that of a fellow servant engaged in the same employment." These words are the natural result of the supposition that the plaintiff was one of the yardmen in duty bound to find and repair the hole, pp 261, 264.

STATE.	FEDERAL.
The unexplained words of Geo. Doliver, p 56, hereinbefore referred to.	The same testimony of Geo. Doliver fully explained so as not to include the plaintiff among any yard men or track men in duty bound to find the hole and repair; pp 89, 219, 247.

The printed rules of the defendant silent as to uncoupling cars or entering between cars in motion.

STATE.	FEDERAL.
Not mentioned or in evidence, p 91.	Pages 114, 207, 247, 248, 257, 258.

The westward descent of the grade at Fifth street cross-

ing, requiring motion of cars for uncoupling.

STATE.	FEDERAL.
Nothing on this subject.	Pages 113, 177, 207, 242.

The general custom and practice of the defendant to uncouple cars in motion.

STATE.	FEDERAL.
Nothing on this subject.	Pages 113, 177, 207, 242.

Statutes of Michigan declaring the defendant's duty as to the street crossing mentioned in the plaintiff's declaration.

—o—

Defendant's charter, Section 13, Laws of Michigan for 1846, page 50:

"SEC. 13. Whenever it shall be necessary for the construction of their railroad to intersect or cross any stream of water or watercourse or road or highway lying on the route of said railroad, it shall or may be lawful for the company to canstruct their railroad accross or upon the same; provided, that the said company shall restore the stream or watercourse, road or highway thus intersected or crossed, to its former state, or in a sufficient manner not unnecessarily to impair its usefulness."

Laws of Michigan for 1877, Act 177, Section 1, being Howell's Statutes of Michigan, Section 3,323:

"Subdivision 5: To construct its road upon or across any stream of water, watercourse, private road, street, lane, alley or highway, and across any plank road, railroad or canal which the route of its road shall lie along or intersect, but the corporation shall restore the stream, watercourse, private road street, alley, lane, highway, plank road, railroad or canal to its former state as near as may be, but shall not materially obstruct the navigation of any stream nor obstruct any public

highway or street by cars or trains for more than five minutes at any one time, and shall construct suitable road and street crossings for the passage of teams *by fitting down planks between and on each side of the rails of such road, the top of which shall be at least as high as the rails of such road,"* said Act having in its title these words:

"And to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this state."

Reply on behalf of the plaintiff in error as to some matters in the brief of Mr. Ashley Pond for the Defendant in error.

The above mentioned brief has on page 2, these words: "The Supreme court of the State sustained the contention of the defendant in that regard, *ruling that upon the facts which the evidence tended to prove, the plaintiff was himself guilty of negligence and the defendant not so guilty."*

The same brief at page 6 asserts without any danger of contradiction, that the opinion Exhibit I is the true means and evidence to ascertain what was decided and what was not decided by the Supreme Court of Michigan; nevertheless, the brief proceeds without any regard for the finding of facts contained in the opinion to use the printed record Exhibit H (78) which the Supreme Court of Michigan was considering to ascertain what was decided and what was not decided. Mr. Pond's entire argument to deprive the plaintiff of the benefit of evidence whether new or old, and to ascertain what shall be the evidence which he contends is cumulative, is based upon the assertion that there is in said printed record just such evidence as the opinion by its use of the words "uncontroverted," "undisputed," adjudicates not to be in said record at all.

The brief on page 5 has these words: "What I do contend is that the said judgment of the state Supreme court precludes the plaintiff from successfully maintaining a new action against the defendant upon evidence tending to prove only the same state of facts which the evidence before the Supreme Court of the state tended to prove."

The first question to be disposed of in the Federal Court was this: Ought the plaintiff to be deprived of all benefit of any legal evidence, new or old, to prove any material fact or conclusion of fact which the opinion Exhibit I adjudicated to be absolutely uncontroverted and undisputed as appeared by the printed record Exhibit H (78) The Supreme Court of Michigan was without power to act as a jury on any question of fact concerning which there was any conflict of evidence and if said court could adjudicate anything, it could adjudicate, whether truly or untruly, is of no importance, that there was an absence from the record of any evidence to controvert or dispute any fact or conclusion of fact. Certainly no such adjudication ought to deprive the plaintiff of the benefit of any legal evidence, new or old, on the new trial to controvert or dispute that which had been left uncontroverted and undisputed in the record, Exhibit H (78.) The opinion contains no adjudication whatever that any particular evidence was inadmissible to prove any particular fact or that any particular fact or conclusion of fact which the plaintiff undertook to prove could be of no avail to him. The opinion is strictly limited to declaring that the record Exhibit H caused all the facts or conclusions of fact set forth in its findings to be uncontroverted and undisputed, and it does not limit the effect of these words so as to adjudicate that there was no controverting or disputing by means of legal evidence, but does use the words so as to mean that there was no controverting or disputing by any evidence or alleged evidence whatsoever. If the opinion can do any thing as an estoppel in this case, it ought to estop the defendant who obtained it from building up any argument based on the existence of evidence which the opinion adjudicates out of existence and from claiming that this opinion is *res adjudicata* in this case and of course good authority in other cases, to abolish the law of evidence, and deprive the plaintiff it has crippled, of all rights under such law.

Mr. Pond's brief avoids giving any particulars of the application of his theory depriving the plaintiff of the benefit of the law of evidence. The finding of facts in the opinion Ex-

hibit I, does set forth particularly the facts which it declares the printed record made to appear uncontroverted and undisputed, and important among these facts is the finding that the hole was but seven or eight inches long and that the time of its existence before the plaintiff received his injuries was uncertain, so that there was no evidence to affect the defendant with notice that the hole was dangerous. Mr. Pond's brief does not explain how evidence in the Federal court to contradict these findings and to show, as he admits on page 9, that the plaintiff's evidence in the Federal Court did tend to show that the hole was a foot to eighteen inches long could be cumulative or otherwise unavailable. He does not explain how evidence in the Federal Court tending to show, as he admits. page 9, that it did tend to show, that the injury to the plank "took place somewhere from a month to two months before the accident," could because of being cumulative or otherwise, be held to be of no avail to the plaintiff to prove that the defendant was affected with notice.

Mr. Pond does not explain how, by the application of any theory, the findings in the opinion, Exhibit I, to the effect that the hole was not of size to be dangerous, could estop the plaintiff from showing by legal evidence that the hole was of size to be dangerous. Certainly the finding that the plaintiff had omitted, by evidence or otherwise. to dispute that the hole was dangerous, could not with any respect to reason, deprive the plaintiff on the new trial of all benefit of evidence to supply the omission. The defendant's contention is in effect no less than this, that the better and plainer was any evidence in the Federal Court to prove that the hole was dangerous and to affect the defendant with notice thereof, the surer was the estoppel by means of the opinion, Exhibit I, to prevent the plaintiff from having any benefit of such evidence.

II.

Most important among the findings of fact in the opinion, especially as to so much of it as would make application of the law concerning the negligence of fellow servants, was the finding (264) "it is shown to have been a part of the duty of the plaintiff to have discovered the defect in the planking com-

plained of and to have repaired the same as well as that of the track master."

Here is a finding in effect that the plaintiff was negligent in not repairing the hole and that any similar neglect of the track master was that of a fellow servant, and the opinion adjudges all this to be uncontroverted and undisputed.

If the opinion is an estoppel at all, it ought to estop the the defendant from contending that there was any evidence to controvert or dispute this most important finding or that this finding was not duly supported by the record; nevertheless on the trial in the Federal Court, the evidence, without conflict and virtually by consent of parties (247), took this finding of fact out of the case and of course took out of the case all of the opinion that depended thereon, yet Mr. Pond's brief (p 6) assumes in effect that it is conceded on behalf of the plaintiff "that the evidence offered on the trial of this case was in substance the same evidence recited before the Supreme Court." It is manifest that taking out of the case this finding of fact was sufficient to prevent the opinion from estopping the plaintiff from having the benefit of legal evidence. The state of facts mentioned in Mr. Pond's brief and in the opinion was a chain in which this finding as to the plaintiff's duty to repair the hole was a link on which all depended.

The finding of fact in the opinion that the undisputed proofs showed that "the plaintiff was daily within ten or twelve feet of it (the hole) from once to a dozen times a day (263)" was, according to Mr. Pond's brief a most important finding and in some mysterious manner, sufficient to deprive the plaintiff of all rights to prove to the contrary in the Federal Court.

It cannot be said that the legal evidence to disprove this finding, which is referred to on page 9 of said brief and sufficientiy appears on pages 90, 101, 102, 114, 115, 220 of the record now here, ought to be condemned as cumulative; it was to show a new and different state of facts.

III.

The question as to disobedience of orders was certainly very important; in relation to the orders from E. D. Bachelor

to help make up trains, the said brief, page 12, has these words: "Now the order which he says he received, was not to go outside of his employment for a particular occasion and to perform a single act, but it was an order in the nature of an enlargement of his duties. * * * * It cannot reasonably be contended that the evidence tends to show that he should undertake to couple and uncouple cars; there were other things he could do to aid the trainmen to get out the trains."

Here is an implied admission that the plaintiff was not prevented by means of the opinion, from proving, if he could, in the Federal Court, that the order to help make up trains did include the uncoupling of cars, and, if it is true that there were other things the plaintiff could do to aid the trainmen in making up trains, it is also true that the uncoupling of cars was a common and well-known means of rendering such aid, and there was evidence before the Federal Court tending to show that this common and well-known means of obeying the order was within its ordinary meaning.

The defendant's witness, E. D. Bachelor, who gave the order, makes an ineffectual attempt to deny the order.

The defendant's witness, E. D. Baehelor, who gave the order, stoutly denied it on his direct examination, but his denial weakened almost to dissolution on his cross examination (216-217). He never attempted to deny that, if he gave the order, it did mean and require that the plaintiff should uncouple cars. The testimony of the witness Jacob Kemple, never sworn in the State Court, has the following words (p 171): "Mr. Bachelor, a few days before this accident happened, called Mr. Gardner to him in my presence and told him that he wanted him to help the boys take out those cars in the morning—the local cars. Mr. Gardner said: 'I don't want to do it, for you and Mr. Gregg both told me not to do it.'"

What was it, what kind of service was it that both Mr. Bachelor and Mr. Gregg had told the plaintiff not to do. The testimony answers this question fully. Mr. Bachelor testifies

on his direct examination (p 203): "He got in and pulled a pin and got hurt. * * * I told him that I didn't hire him to do that kind of work and wanted him after that to stay out of there; stay away from it altogether; to have nothing to do with pulling any pins for anybody; it wasn't his duty."

Page 204. Q. What kind of work did you mean?

A. Pulling pins and switching.

Q. Helping to make up trains?

A. Yes sir.

Frederick Gardner testifies (p 80):

Q. Did anything happen in Feb. 1882?

A. Yes sir.

Q. What?

A. I got squeezed between the car and the track.

Q. Did anybody—did any of the officers of the road see you and speak to you about that?

A. Mr. Gregg and Mr. Bachelor did.

Q. What is Mr. Gregg's business?

A. He is the freight agent.

Q. Well, what did they say to you on that occasion?

A. They told me I shouldn't do that any more; I had no business there.

Q. What?

A. Help uncouple cars.

Therefore the testimony of the man who gave the order and of the man who received it, agree in proving that the service which the last order required was the same which the order forbade and that both orders referred to uncou as a part of such service. Assuming the last order w

There was further testimony by Mr. Bachelor ar Etzcorn, the defendant's witness (185-201-203-204-205) and also by the plaintiff himself (81-82-102-103) to show that the last order required the uncoupling of cars.

E. D. Bachelor testifies (p 209): "The switchmen have the making up of the trains, coupling cars and uncoupling them."

It is impossible for the defendant to be specific and make application of any intelligible theory by which the pla ntiff can be estopped from having the benefit of this explanatory evidence. The opinion adjudicates that the giving of the order by E. D. Bachelor to the plaintiff to help the other men make up trains (262) was among the uncontroverted facts and left the plaintiff free to explain by his own testimony and by the the testimony of other witnesses, whether sworn in the State Court or not, and by circumstantial evidence that the order to help make up trains, which Mr. Pond's brief (p 12) truly declares to be a continuing order, did require the uncoupling of cars by the plaintiff.

IV.

The testimony in the Federal Court as to the words exchanged between John Etzcorn and the plaintiff just before the plaintiff received his injuries and as to the surrounding circumstances, see plaintiff's brief pages 13 to 21, was such as to make it morally impossible for the defendant to set up any reasonable pretence that the state of facts as to these matters was substantially the same as that appearing in the finding contained in the opinion Exhibit I. The only claim left for the defendant to make is that it is of no importance how much the state of facts appearing by the testimony in the Federal Court differs from from the state of facts set forth in the opinion, if it does not differ sufficiently from the state of facts appearing in the printed record; in other words that the less the fiinding of facts in the opinion was supported by the printed Exhibit H, the better the defendant's chances to claim that the opinion is an estoppel, depriving the plaintiff of the benefit of legal evidence.

V.

The truth is that if the opinion ought to estop either party, it ought to estop the defendant from gaining anything by showing that the state of facts in the opinion differs from that in the printed record exhibit H; there remains after all, the evident truth that the state of facts appearing by the evidence in the Federal Court differs materially from that ap-

pearing in the printed record and on no theory of estoppel can the plaintiff be deprived of the benefit of legal evidence.

Mr. Pond's brief throughout depends upon the assumption that the decision of the Supreme Court of Michigan is that the plaintiff cannot recover on the printed record Exhibit H, whereas in truth the decision is "that the defendant cannot be held liable upon the facts appearing in this record, the words 'appearing in this record' referring to the finding of facts contained in the opinion and commencing with the words (261) *'From the record it appears,'* rendered exclusive by the adjudication that the printed record left those findings uncontroverted and undisputed."

No sane man would contend that the defendant ought to be held liable on any such state of facts as is set forth in the opinion.

The most important of these alleged facts were such as the defendant and not the plaintiff had been contending for. No lawyer in the case, reading the opinion, could believe that on the new trial granted, the evidence would sustain any such finding of facts as appeared in the opinion. The defendant is here with a theory that the greater the untruth of this finding of facts set forth in the opinion and the better the legal evidence in the printed record was to sustain conclusions of fact in favor of the plaintiff, contrary to the most important findings in the opinion in favor of the defendant, the surer the estoppel worked by the opinion must be to deprive the plaintiff of the benefit, not only of said evidence, but of all further and other evidence of like tendency. The defendant's claim is in effect this: That if there was any evidence in the printed record to prove the defendant guilty of negligence, notwithstanding the adjudication in the opinion that no such evidence existed, then not only this evidence, but all other or further evidence to prove the defendant guilty of negligence would be rendered unavailable to the plaintiff on the new trial by the marvelous estoppel power of the opinion, and if there was any legal evidence in the printed record to prove the plaintiff not guilty of negligence, notwithstanding the adjudication that no such evidence existed, the plaintiff would on the

new trial be in like manner estopped from having any benefit of such evidence.

The defendant's theories are fearfully and wonderfully made to crush all of Frederick Gardner's rights as the defendant's appliances at the street crossing crushed his bones.

Supplemental Authorities.

The fellow servant theory not applicable at all.

B. & O. R. R. vs. Baugh, 149 U. S., 383, 388.

The plaintiff's failure to see the hole no negligence.

Maltby vs. C. & W. Ry. Co., 52 Mich., 110, 111
Thayer vs. R. R. Co., 93 Mich., 155.
Roux vs. Lumber Co., 85 Mich., 527, 528.
Kane vs. N. C. Ry. Co., 128 U. S., 95.
Coons vs. Cordage Co., 102 Mass., 578.
Retan vs. Ry. Co., 94 Mich., 146.

The fuller development of facts by witnesses testifying the second time, and by new witnesses.

Post vs. Pierson, 108 U. S., 422.
Andrews vs. Hovey, 123 U. S., 269.
Alpena Nat'l Bk. vs. Greenbaum, 80 Michigan, 8, 9.
White vs. Campbell, 25 Mich., 463.
Lehnen vs. Dixon, 148 U. S., 77.
Bigelow on Estoppel, 4th Ed., p 57.

EDWARD BACON,

Of Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FREDERICK GARDINER, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY, DEFENDANT IN ERROR.

SECOND SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

Construction of the opinion, Exhibit I, under—
Van Deusen *v.* Letellier, 78 Mich., 505, and Larzelere *v.* Starkweather, 38 Mich., 100.

I.

These decisions show that the words in last lines of page 263 of the printed Record now here, "It would seem that the defendant had done its whole duty in the premises," have no power as *res adjudicata;* they belong to mere reasonings of the judge who wrote them on questions other than the question of disobedience of orders on which the case was decided. This is also evident by an examination of the opinion itself,

especially of the words which dispose of the case at the end of the opinion: "I think it must be held that the plaintiff necessarily took the risk; that it was his voluntary act, and the defendant cannot be liable upon the facts appearing in this record." These words are fully accounted for by the next preceding words, as to disobedience of orders, in the paragraph beginning with the words, "We are relieved from further consideration of this subject, however, in the present case," and ending with the most important words, "THESE VIEWS RENDER DISCUSSION OF THE OTHER POINTS MADE UNNECESSARY."

There are many expressions throughout the opinion which show the discussion is left unclosed, such as these: "The other testimony went to show," 262. Mr. Batchelor testifies, 262, "It would seem," 263. "And it would seem quite clear, I think, that the only ground on which the plaintiff can rest his claim must be," 263. "I think it must be conceded," 264. "He says," "The plaintiff says," "Etzcorn says," "I am inclined to the opinion however," 265. The words "Render discussion of the other points unnecessary" are of controlling importance and plainly imply that discussion was omitted which would have taken place if the other points had been disposed of, and if not disposed of there is concerning them no estoppel to render illegal any legal evidence, new or old.

II.

It becomes most important to examine and see what were the other points left not only undecided but without the discussion which would have taken place if they had been disposed of.

The specification of these points is on page 263. First are set down the plaintiff's points alleging in the declaration "negligence on the part of the defendant in suffering the defect in the plank described to continue unrepaired

till it occasioned his injury and averring no neglect on his part."

Then follow the four enumerated points on the part of the defendant. First is put the alleged duty of the plaintiff to find and repair the hole; second, that no other employé's neglect to do this exceeded the plaintiff's; third, the alleged negligence of the plaintiff in going between cars in motion; fourth, the plaintiff's voluntary disobedience of orders.

The case was disposed of on the fourth and last specification, and all the other points on both sides are left open and without even the discussion which there would have been if the case had been disposed of on any of them.

If there was such disobedience of orders, as the case was decided upon in its final sentences, there was not the slightest need of deciding whether or not the hole was too little to be dangerous or whether or not the defendant was affected with notice, whether or not by reason of any facts in the case the defendant was guilty of negligence, whether or not the plaintiff was guilty of contributory negligence by not finding or not repairing the hole or otherwise than in disobeying orders, or whether or not the fellow-servant theory could help the defendant.

III.

That the court did intend to leave all these points other than disobedience of orders undecided is evident for other plain reasons. The findings of facts are all of minor facts which could only be used as evidence or reasons in discussion to ascertain important facts or conclusions of fact of an ultimate nature.

Mr. Pond assumes that there is an adjudication that the hole of no more than eight inches long was not dangerous. There is no such adjudication. The opinion contains findings, recitals of evidence, and argu-

ments fit for use in discussing the question whether or not the hole was dangerous, but by reason of the terrific force of the dissenting opinion or by the interference of the judge who concurred in the result or otherwise *the conclusion that the hole was not dangerous is nowhere to be found.*

The court could not adjudicate on the question whether or not the hole was dangerous without assuming the power of a jury, and attempted no such thing.

IV.

The opinion contains some statements of fact, recitals of evidence, and arguments fit to be used in discussing the question whether or not the defendant was affected with notice of the hole. *Nevertheless, the conclusion that the defendant was not affected with notice of the existence of the hole is nowhere to be found.*

V.

The opinion contains many statements of minor facts, recitals of evidence, and arguments fit to be used in discussion to ascertain the two ultimate conclusions of fact necessary in disposing of the two great questions: First. Was the defendant guilty of negligence? Second. Was the plaintiff guilty of contributory negligence in not finding the hole and repairing it? But nowhere can be found the conclusion that the defendant was not guilty of negligence, or that the plaintiff was guilty of contributory negligence otherwise than in disobeying orders.

VI.

If the words, " It would seem, therefore, that the defendant had done its whole duty in the premises," are all that Mr. Pond would have them be, namely, an unconditional and

complete finding that the defendant is not guilty of negligence, these words are written after a collective statement of minor facts and after numerous recitals of evidence and arguments, so as to depend upon all of these collectively, and most important among these minor facts is the finding, on page 261, that the plaintiff's duty was not only to find the hole, but to repair it; that his duty was to the extent that he was bound to do the repairing without even calling on the track master, unless the necessary materials were not on hand at the station. The opinion makes the plaintiff a partner with George Doliver, the track master, in this important duty, and implies that the plaintiff might decide as to the materials and the plan for repairs and as to the execution of such plan, so that not only the safety of property, but the safety of life, might depend on his wisdom.

To explain the words "its whole duty in the premises:" The opinion shows what the defendant had done in the premises—that is, in fulfilling its duties to the plaintiff; that it had caused good plank for the crossing to be well laid, and had employed very competent men, among them the plaintiff, to care for and keep in repair this crossing. According to the opinion the defendant had entrusted and honored the plaintiff with full authority to repair the hole, had made it his bounden duty to do so, and kept abundant material either at the Niles station to be taken forthwith or elsewhere to be obtained on the plaintiff's order. According to the opinion the defendant might well be said to have done its whole duty in the premises. There is no reason to believe that if there had been no such finding of the supposed authority and duty of the plaintiff there would have been written the finding as to defendant's doing its whole duty. There is no reason to believe that the finding would have been the same with this duty, authority, and provision out of the case as with them in it.

The opinion is to the effect that there was nothing left for the defendant to do in its duty to the plaintiff; that the defendant ought not to be considered in default because of the plaintiff's fault in not finding and repairing the hole. To adjudge the defendant in default would be to adjudge that the plaintiff might take advantage of his own wrong. The duty of the plaintiff to repair was a most important fact, according to the theory of the opinion, to show that the defendant as to him had done its whole duty.

VII.

The words "It would seem that the defendant had done its whole duty in the premises" depend upon each and all of the findings of fact, recitals of evidence, and arguments which precede, and there is nothing to show that these words would ever have been written without all material parts of such preceding findings, recitals, and arguments.

On the trial in the Federal court there went out of the case virtually, by consent of parties, all of the alleged duty of the plaintiff to find and repair the hole. The Michigan Central Railroad Company failed to contend that any of its switch-tenders ever had any such duty and hitherto fails so to contend. There are other findings on pages 261, 262, and 263, which there was plain legal evidence in the Federal court to take out of the case, 1st, the finding that the hole was but seven or eight inches long and on the surface; 2d, that it appeared by the plaintiff's testimony that the hole was such that he might have passed it a hundred times a day and not have seen it; 3d, that it was of such a character that if he had passed it a hundred times a day he could not have seen it; 4th, that he was daily within ten or twelve feet of it from once to a dozen times a day.

VIII.

The words "It would seem, that the defendant had done its whole duty" might never have been written were it not for the preceding words on page 261, "At some time previous to the morning the injury occurred to the plaintiff" (the exact time, however, is not shown by the record and the words on page 263 did not) "the injury to the plank was so small as to escape the notice of all the persons in the yard except two and that of the plaintiff, who was daily within ten or twelve feet of it from once to a dozen times a day, and it would appear that even the two persons who did see it did not deem it of consequence enough to report it to the yard master or repair it themselves, it being their duty so to do if it was dangerous, and there is no pretence that the company had actual notice thereof."

These words appear to be intended for an argument that if the night switch-tender was unaffected with notice of the hole, so must be the defendant, and that if there was any need of notice, the longer such need existed the greater the neglect of the plaintiff in not reporting or repairing, which he ought not to take advantage of to charge the defendant with notice.

These words are such as might have been used in a discussion to ascertain whether or not the defendant was affected with notice of the hole, and although no conclusion can be found that the defendant was unaffected with notice, these words on the subject of notice are as likely to have been the cause of the words "It would seem that the defendant had done its whole duty in the premises" as are any words as to the size of the hole, there being nowhere to be found the conclusion that the hole was dangerous, there would be no need of both conclusions. Either one would show that the defendant had done its whole duty toward the plaintiff in the premises. If the

hole was not dangerous, there would be no need of notice; and if there was no notice, no dangerous nature of the hole could make any difference. There could be no default in duty to repair without notice of something to repair.

The opinion nowhere shows both conclusions, namely, that the hole was not dangerous and that the defendant was unaffected with notice; it does not show either conclusion; and it is not true that both or either can be presumed: but if either is to be presumed and it is uncertain which must be presumed, there is no estoppel to deprive the plaintiff on the new trial of any legal evidence, new or old, concerning these subjects. Especially must this be true while the opinion has in the same court from which it came been construed to be not *res adjudicata* on any subject other than disobedience of orders, and as to the alleged disobedience of orders there can be no reasonable doubt that the plaintiff was entitled to submit his case to the jury in the Federal court.

(See his first brief, commencing at p. 8.)

EDWARD BACON,
Attorney for Plaintiff in Error.

THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

Term No. 71.

FREDERICK GARDNER, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for Western District of Michigan.

STATEMENT OF CASE AND BRIEF OF ASHLEY POND ON BEHALF OF DEFENDANT IN ERROR.

John F. Eby & Co., Printers, Detroit.

THE SUPREME COURT OF THE UNITED STATES.

FREDERICK GARDNER, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for Western District of Michigan.

STATEMENT OF CASE AND BRIEF ON BEHALF OF DEFENDANT IN ERROR.

I.

Briefly stated, the case made by the declaration is this, to wit:

On and prior to May 17, 1882, the plaintiff was in the employ of the defendant as a night switchman at its station at Niles, Michigan; on the morning of the said day, while attempting to uncouple certain freight cars, his right foot was caught in a hole in a plank alongside of one of the rails of one of its tracks, and before he could extricate it a car was backed down upon him and run over his right leg, crushing it in such a manner as to make amputation necessary.

The place of the accident was at a street crossing which was planked, and the defective plank was one of the planks within said street.

The faults charged against the defendant as ground of liability, so far as they seem material to be considered, are:

1. That the plaintiff's superior ordered him to do such coupling, which was out of the line of his employment as a switchman, and more dangerous.

2. That the defendant was guilty of negligence in permitting such hole in said plank.

The declaration contains four counts quite loosely drawn, but the above is, I believe, a fair statement of their material gist.

The fourth count of the declaration, it is true, alleges, in addition to the alleged acts of negligence above mentioned :

1. That the engine in use on the occasion of the accident had no air brake ;

2. That the brake upon the car which ran upon the plaintiff was not properly constructed, or rather, adjusted ; and

3. That the engineer was incompetent.

But I think it can safely be said that there was no evidence offered on the trial tending to show that the accident resulted from either of these several alleged faults.

The history of the controversy is somewhat peculiar.

The plaintiff, some time after the accident, brought suit against the defendant in one of the Michigan State courts, to wit, in the Circuit Court for the County of Berrien, Michigan, and by his declaration counted upon the same alleged faults of the defendant first above mentioned. To the declaration in that suit the defendant pleaded the general issue, and the suit was in due course brought to a trial before a jury, with the result of a verdict for the plaintiff with damages.

The defendant sued out a writ of error from the Supreme Court of the State and alleged as error the ruling of the Court below that, upon the facts which the evidence tended to prove, the defendant was liable to the plaintiff, and in submitting the case to the jury, and the Supreme Court of the State sustained the contention of the defendant in that regard, ruling that upon the facts which the evidence tended to prove, the plaintiff was himself guilty of negligence, and the defendant not so guilty, and as the result of such ruling reversed the judgment below and remanded the case for a new trial. A copy of the opinion of the Supreme Court of the State will be found at page 260 of the printed record.

After the case had been so remanded, the plaintiff discon-

tinued it, removed to the State of Indiana and began in the Circuit Court of the United States for the Western District of Michigan the suit, the record of which is here for review.

In that suit the defendant pleaded the general issue, and gave notice thereunder that it would offer in evidence the judgment so rendered by the Supreme Court of the State, and would rely upon the same as a defense.

The case afterwards came on for trial before His Honor, the District Judge, Judge Severens, and a jury, and the evidence offered and admitted was in all material respects the same as that which appeared in the record which was before the Supreme Court of the State, and on which it based its judgment exonerating the defendant from liability. This fact, that is, that the evidence offered on the trial of the case in the court below was in all material respects the same as that recited in the record before the Supreme Court of the State, is expressly stated in the opinion of the Circuit Judge, Judge Jackson, granting a new trial as hereinafter stated, and is, as I hereinafter show, in effect conceded by the district judge in his dissenting opinion.

That record was introduced in evidence, and appears as a part of the bill of exceptions in this case (printed Record, pp. 26–77).

The district judge overruled the defense based upon such record and judgment, and submitted the issues to the jury, with the result of a verdict for the plaintiff with damages.

Thereupon the defendant moved for a new trial, basing such motion upon the ground that the Court erred in its ruling with reference to the effect of said record and judgment.

Said motion came on for argument before the Circuit Judge, Judge Jackson, and the District Judge, Judge Severens. Judge Jackson ruled that the district judge erred in his ruling at the trial that the said judgment of the State Supreme Court constituted no defense to the action, and ordered a new trial. (See his opinion, printed Record, p. 266.)

The district judge dissented from this ruling of the circuit judge, not, however, upon the ground that the evidence introduced on the trial before him tended to prove any different state of facts from that which the evidence before the State Supreme Court tended to prove, but upon the ground that there was "cumulative" evidence of such state of facts, and that, in his opin-

ion, such "cumulative" evidence was sufficient to take the case from under the effect of the judgment of that court. (See his opinion, Record, pp. 266–268.)

A new trial was thereupon had under the order of the circuit judge. This trial was substantially *pro forma*. The evidence, with the exception of the testimony of three witnesses called by the plaintiff, who were not sworn upon either of the former trials, was the same as in the former trial, most of it being read in evidence from the stenographer's minutes of the former trial, and the jury, under the direction of the Court, returned a verdict for the defendant, and judgment followed, and it is that judgment that is here for review. The evidence of the three new witnesses mentioned, as I shall hereafter show, in nowise strengthened the plaintiff's case.

II.

On behalf of the defendant in error I contend and submit:

1. That the ruling of the circuit judge that, under the circumstances, the said judgment of the Supreme Court of the State constituted a perfect defense to the action, is correct, and that the judgment below must, for that reason, be affirmed.

2. That, irrespective of the effect of the judgment of the Supreme Court of the State, the plaintiff was not entitled to recover upon the facts which the evidence tended to prove, and hence, for that reason, there was no error in withdrawing the case from the jury, and the judgment below must be affirmed.

I. As to the former of the above propositions:

Let it be understood at the outset that I do not contend that the judgment of the Supreme Court of the State, resulting as it did in the order for a new trial of the action in the Circuit Court of the State, and followed as it was by a discontinuance of that action, operated to bar the plaintiff from bringing, in another court, or indeed, in the same court, another action against the defendant to recover damages on account of the injury he suffered by the accident described in his said action in the State Court.

What I do contend is that the said judgment of the State Supreme Court precludes the plaintiff from successfully maintaining a new action against the defendant upon evidence tending to prove only the same state of facts which the evidence before the Supreme Court of the State tended to prove.

"It is an undoubtedly settled law that a judgment of a court "of competent jurisdiction on a question directly involved in "one suit, is conclusive as to that question in another suit "between the same parties."

Per Field, J., in Russell vs Pease, 94 U. S, 606

The questions, therefore—and the only questions—which present themselves for determination here are:

(1) Was the Supreme Court of the State of Michigan a competent court to entertain and determine, as between the parties here, the question of whether the defendant was under any liability to the plaintiff upon the facts which the evidence presented to that court tended to prove?

(2) Was such question involved in a litigation between said parties in said court?

(3) Did such court determine said question and render a judgment thereon against the plaintiff and in favor of the defendant?

(4) Did the evidence offered on the trial of this case, the record of which is here for review, tend to prove only the same state of facts as did the evidence which was before the Supreme Court of the State as the basis of its said judgment?

That the first and second of these questions must be answered in the affirmative is too clear to permit of argument.

Beyond controversy, the State Supreme Court was a competent Court to entertain and determine the question as to the liability of the defendant to the plaintiff upon the facts which the evidence laid before it tended to prove.

And equally beyond controversy is it that in the litigation between the parties hereto in said court that question arose and became material for determination.

The said fourth question must, *prima facie* at least, be answered in the affirmative. As I have hereinbefore said, the Circuit Judge expressly states, and the District Judge in effect concedes, that the evidence offered on the trial of this case was in substance the same evidence recited before the Supreme Court of the State, and therefore, until I am advised that counsel for the plaintiff in error controverts this conclusion of the Court below, any attempt on my part to sustain its correctness is uncalled for.

As to the third question: It is certain that the State Supreme Court considered and determined the question which so arose between the parties.

It is true that the formal judgment entered, does not upon its face show that such question was determined. But that fact was properly shown by the opinion of the Court which was introduced in evidence. That evidence *aliunde* the record was admissible for that purpose is settled by the authorities.

Russell vs. Pease, 94 U. S., 606.
Campbell vs. Rankin, 99 U S. 261.
Wilson, Executor, vs. Deen, 121 U. S., 525.

The statute required the opinion to be filed.

2 Howell's Annotated Stat., Mich., § 6426, as follows:

"The decisions of the Supreme Court, with the reasons therefor, shall be in writing, and signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing, under his signature; and such opinions shall be filed in the office of the clerk of the Supreme Court, where such opinions may have been delivered."

And it is beyond question, I submit, that such determination, and the order of said Court as the result of such determination, constitute a judgment within the strict legal signification of that term.

The contrary of this cannot be contended except upon the theory that the proceeeding in the Supreme Court was a continuation of the same case—that is, of the same suit—in which the judgment under review was rendered.

But such theory is not tenable.

The suing out of the writ of error was the commencement of a new suit—not a continuation of the suit below to which it related.

1 Tidd's Practice, 94.
2 Tidd's Practice, 1141.
Roberts vs. Fohs, 32 Ill., 474
International Bank vs. Jenkins, 104 Ill., 143.

Under the common-law practice this suit would have proceeded to an issue by formal pleadings. This practice is recognized in Michigan by a rule adopted by the Supreme Court as follows:

"*Rule 13.* Joinders in error are abolished. If the defendant in error wishes to plead in bar to the writ, or if the error assigned is one of fact and not of law, the defendant shall plead within ten days after the expiration of the time for assigning errors, and each subsequent pleading shall be filed within ten days after the expiration of the time for filing the preceding pleading."

The judgment thus rendered by the Supreme Court of the State is a final judgment. It is true that it is not a final judgment in the sense that it put an end to the suit between the parties in the Court below; but it is final in the sense that it is a final determination of the suit in which it was rendered, to wit: the suit begun by the issue of the writ of error from the Supreme Court of the State and a final determination of all questions which entered into such judgment.

I am aware that the language of the books as to the effect of such a judgment is that it "becomes the law of the case," but I submit that it becomes the law of the controversy. It becomes the law of the case because it is *res adjudicata*, and because it is *res adjudicata* it becomes the law of the controversy. It cannot be possible that the effect of such a judgment can be avoided by discontinuing the original suit in the Court below and beginning a new suit upon the same cause of action either in the same Court below or in a different Court. The notion that such effect can be so avoided seems to be a modern invention, as, after diligent search, I have been able to find only one case directly presenting the question, to wit:

Hazard vs. C., B. & Q. R. R. Co., 4 Biss., 453.

The history of the controversey there involved was on all fours of the history of the controversy here, to wit: The plaintiff first began a suit in the State Court; a trial was had, which resulted in his favor; the judgment was reversed by the State Supreme Court upon writ of error, and a new trial ordered; the suit in the State Court was then discontinued by the plaintiff and a new action brought in the United States Court. The question as to the effect of the judgment of the State Supreme Court, reversing the judgment of the Court below, was the question under consideration. The opinion was by Judge Drummond. The *syllabus* which follows the opinion is as follows:

"1. Where a suit commenced in the State Court has been carried to the Supreme Court, and a new trial ordered, the plaintiff has the right to dismiss his suit and commence in the Federal Court; the opinion of the Supreme Court does not constitute a bar unless it finally determines the suit.

"2. But, on substantially the same state of facts, the plaintiff is bound by the *law* as laid down by the State Supreme Court: He cannot change the forum to obtain a different ruling.

"3. The plaintiff has the right, however, to introduce evidence showing a new or different state of facts from those shown on the former trial."

This *syllabus* states the law exactly as I here contend.

I am not unaware of the fact that, in the opinion of Justice Miller, in the case of *Bucher vs. Cheshire R. R. Co.*, 125 U. S., 578, there is a dictum which, at first blush, appears to be adverse to the position for which I am contending; but I think an examination of that case will satisfy that what is there said has no application here. It will be found that the statement that there had been no judgment rendered in the State court is literally true. A verdict had been rendered in the case, but no judgment had been entered thereon. Upon the trial certain exceptions to rulings of the trial judge had been taken, and these were the subject of review by the same court sitting in bank, and, such exceptions being sustained, a new trial was ordered. The situation was exactly the same as it would have been had a motion for a new trial been made and heard before the trial judge upon allegations of error in his rulings, and he had granted a new trial.

III.

Irrespective of any effect of the judgment of the Supreme Court of the State, the case was rightfully withdrawn from the jury.

As I have already indicated, the plaintiff's case was based upon allegations of fault upon the part of the defendant in two respects, to wit:

(1) In permitting the existence of the hole in the plank in which the plaintiff's foot was caught;

(2) In ordering the plaintiff out of the line of his employment as a switchman into a more dangerous employment.

I. As to the first of these alleged faults:

From the evidence offered by the plaintiff it appears:

1. That this hole was caused by the derailment of a car through a misplaced switch; that such derailment was the fault of a co-employe, who testifies that he did not report it to his superior, because, as he states, he would have been suspended, not for reporting it, but for having caused the derailment of the car (printed Record, p. 158); and that such derailment and injury to the plank took place somewhere from a month to two months before the accident;

2. That such hole was of small dimensions, to wit, about four inches in width at the widest place and about [redacted] to eighteen inches long and tapering to a point; and

3. That one of the switches which it had been the duty of the plaintiff to attend was situated somewhere from fifteen to twenty feet from this hole—the plaintiff says twenty feet (see printed Record, p. 89)—and that the plaintiff went on duty at 6:40 in the evening and left at 7 in the morning. He was, therefore on duty during ~~the night~~ daylight.

With reference to his opportunity to have known of said hole the plaintiff testified as follows, to wit (printed Record, p. 97):

"I attended it (the switch) more or less from the time I went to work night."

Again (printed Record, p. 132):

"Q. How many times during the night would you handle that switch? A. Some nights would not have to handle that one at all. Q. Then again you would handle it frequently? A. Then again every five or ten minutes."

Again (p. 133):

"A. * * * * I might have handled it that night. Q. It was a switch that was frequently handled? A. Yes, sir."

Again (p. 141), referring to this hole, he says:

"I could go by it one hundred times and not see it unless my attention was called to it."

It is evident, therefore, beyond question, I submit, that in the performance of his duties the plaintiff had frequent occasion to be near this hole; and yet he testifies that he did not discover it, that he had never seen it before the morning he was hurt, had never heard of it before that morning, and that he might have passed it a hundred times and not see it (printed Record., p. 95).

It also appears from the testimony of Jacob Kemple, a witness on the part of the plaintiff, that he assisted in putting the derailed car back on the track, and that at that time he did not notice this hole, and never knew of it until after the accident; and, so far as it appears, no employe of the company, or any other person except John Lino (the witness who says the car was derailed by his fault), noticed this hole until after the accident.

In this connection, I call attention to a rule of the defendant introduced in evidence, and which the evidence shows was in the hands of all of defendant's employes (Record, p. 258). This rule is as follows:

"*Rule 44.* Any employe observing any obstructions or damage to road or bridges, or observing any circumstance that indicates danger in any way, will leave at nearest telegraph station, a written report of the same, and will take such further steps as will insure safety. All such reports must be telegraphed by the agent or operator to division headquarters, and notice of the

obstruction or danger must be given to conductors of all trains until orders are received from division headquarters to discontinue such notice. Conductors will report by telegraph to division headquarters, all heavy storms or rains, liable to affect the road. Operators will report by telegraph to division headquarters all sudden changes in the weather."

It is certain, therefore, that the hole must have been one so insignificant as an element of danger as not to attract attention, and that the plaintiff had probably the best opportunity of anyone to discover it.

I submit, therefore, as ruled by the State Supreme Court, there was no evidence tending to show the company in fault, with reference to permitting said hole to exist, sufficient to be submitted to the jury.

II. As to the allegation that the defendant was in fault in ordering the plaintiff out of the line of his employment into a more dangerous employment:

The case upon this point, made by the plaintiff's testimony, is this, to wit: that he was originally employed as a switchman to attend switches; that, at one time without any orders from his superior, he volunteered to assist in making up a train and got "pinched," and that he was then ordered by his superiors to attend to his own business and never again undertake to couple or uncouple cars—that it was not his business. He claims, however, that subsequently, a week or two before this accident happened, he was told by his immediate superior to "assist the boys (meaning the trainmen), when he had nothing else to do, in the morning, in getting out the trains, that is he says help them switch and couple and uncouple; that he replied to this order, "You forbade me to do this," and was told in reply that his services were now needed, and that if he would not do it he (the superior) would get some one who would do it; and thereupon he assented to comply with the order. But his version of this conversation with his superior is not sustained by his own witness, Jacob Kemple. Kemple testified as to that conversation, as follows (Record, p. 171):

"Q. Now just tell what you heard, as slowly as you can? A. In regard to this switching? Q. Yes. A. Mr. Batchelor, a few days before this accident happened, he called Mr. Gardner to him in my presence and told him that he wanted him to help the boys switch out those cars in the morning—the local cars; Mr. Gardner said, 'I don't want to do it, for you and Mr. Gregg both told me not to do it;' Mr. Batchelor then replied and said, 'Well, you will have to do it, because we are short of help, and we can't get along without you do it;' he says, 'If you don't, I will have to get somebody that will.'"

Thus on direct examination. On cross-examination (Record, p. 173):

"Q. Now, are you sure that you have told the conversation verbatim, just as it occurred that evening, did you say? A. As Mr. Batchelor gave it, yes, sir; I am positive that is the way he gave it."

Now, I submit that, taking the plaintiff's testimony in connection with that of his witness Kemple, it cannot reasonably be contended that the evidence tends to show that his superior intended that he should undertake to couple and uncouple cars. There were other things he could do to aid the trainmen get out the trains.

But, assuming that the order of the superior was as the plaintiff construes it, the case was this: The plaintiff was employed as a switchman. So far as the record shows—and unquestionably such was the fact—he was not employed for any specified time. He was at liberty to quit the employment whenever he chose, and the company was at liberty to discharge him at any time. Now, the order which he says he received was not to go outside of his employment for a particular occasion and to perform a single act, but it was an order in the nature of an enlargement of his duties, and when he assented to obey the order he assented that his duties should be so enlarged, and the work he afterwards did was within and not outside of the line of his duties.

Leary vs. Boston & Albany R. R. Co., 139 Mass., 580, squarely sustains this proposition. The case was this:

A person of full age and ordinary intelligence entered the employ of a railroad corporation as a freight truckman, loading and unloading cars in its yard and shifting freight in its freight

houses. After working in this capacity about three years, he was directed to perform, in addition to his regular duties, those of a fireman, from one to three hours a day, upon an engine which was used to shift freight cars in the yard, where there were many tracks, sidings, frogs, and switches, and to make up trains. He had acted as such fireman about twenty times, when, while standing on the foot-board of the engine, with his back towards the direction in which it was moving, and waiting for its speed to slacken so that he could get off, he was jolted off and injured. He had been brought up on a farm, and had ridden but six times in railroad cars. It was *held* that the injury was caused by one of the risks assumed by him in his employment, and that the action could not be maintained. The second paragraph of the *syllabus* reads as follows:

"If a servant, of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action against the master for such injury."

IV.

The three new witnesses called by the plaintiff on the last trial are Jacob Kemple, Albert Buck and William Metcalf.

Kemple's testimony is found on pages 167 to 175 of the record. His testimony, with the exception of that which refers to the conversation between the plaintiff and his superior on the subject of assisting the men in switching, touches only the following subjects, to wit:

(1) That he assisted in putting back on the track the car which is supposed to have made the hole in the plank, and that he did not at that time discover the hole;

(2) That he saw such hole immediately after the accident, and he describes it as described by the other witnesses.

The testimony of the witness, *Albert Buck*, will be found at pages 175 to 181. He was apparently called to sustain the fourth

count of the declaration, that the engineer operating the engine at the time of the accident was incompetent; but his testimony falls far short of having any such tendency. It is simply to the effect that engineers work their way up from fireman, and until they have served as engineers for three years they do not receive the same wages as more experienced engineers, and are called during such three years "apprentice engineers;" but his testimony showed that the practice is a general one, and it is clear that, under it, an engineer who has not served three years might be more competent than another who has served many years longer, though the former would receive less pay, and this the witness concedes (Record, p. 178). He gives no testimony whatever bearing upon the competency, in fact, of the engineer upon the engine in question.

The only other subject touched by the evidence of this witness is that of the practice of going between cars while in motion to couple and uncouple.

The testimony of *William Metcalf*, the third of the new witnesses, appears on pages 181 to 184. The only subject upon which he testifies is the practice of going between cars when in motion, to couple and uncouple.

I submit, then, upon this part of the case, that the testimony given by these new witnesses is not such as to take the case out of the effect of the judgment of the State Supreme Court.

The judgment below, I submit, was correct, and should be affirmed.

ASHLEY POND,
Of Counsel for Defendant in Error.

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IN THE

Supreme Court of the United States.

FREDERICK GARDNER, PLAINTIFF IN ERROR,

vs.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

Supplemental Brief for Defendant in Error.

Since my original brief was written and printed I have received a brief and supplementary brief for plaintiff in error, and desire to say a few words in reply upon a single question, to wit: The question as to whether the evidence in the Federal court bearing upon the alleged negligence of defendant with reference to the existence of the hole in a plank which seems to have been the effective cause of the accident by which plaintiff was injured was materially different from the evidence upon the same subject before the State supreme court.

With reference to other subjects discussed in plaintiff's briefs I do not care to say anything in addition to what I have said in my original brief, as it seems to me that such other subjects, the evidence upon which is referred to in such briefs, are of slight, if any, materiality. Especially is

this true, I submit, as to the allegations contained in the declaration (1) that the engine in use on the occasion of the accident had no air brake; (2) that the brake upon the car which ran upon plaintiff was not properly adjusted; (3) that the engineer was not incompetent, because it is clear that, upon plaintiff's own contention, neither of these alleged faults, if they existed, nor all of them combined was the cause of the accident. The most that counsel for plaintiff seems to contend is that they aggravated plaintiff's injuries.

The plaintiff's contention that defendant was guilty of negligence with reference to the existence of such hole is based upon its character and size and the time which it had existed, and in his supplementary brief he contends that the evidence upon these subjects in the Federal court was sufficiently more favorable to the plaintiff than the evidence in the State court upon the same subjects to take the case from under the judgment of the State court and require it to be submitted to the jury. It seems, therefore, important to compare the evidence in the two courts upon these subjects.

1. *As to the Character and Size of Such Hole.*

The evidence from plaintiff's witnesses in the State court is as follows, to wit:

GARDNER, the plaintiff, Record, p. 32:

"Don't think the hole on top was quite as long"—that is, as long as is shown by the model of which the exhibit on page 184 of the Record is a photograph.

D. B. Cook, Record, pp. 38 and 39:

"Q. Describe the shape of the hole as near as you can.

"A. I saw this representation here (referring to the model). It appears to me that the wood comes up to the rail a little too quick. It appears to be a little bit too wide. Still I am not prepared—I did not take any very particular notice of it. I hurried up to the wounded man as quick as I could to see the amputation. * * * Don't think it was quite a correct representation (referring again to the model). My impression is that it is a little too wide here."

Again witness says, "He did not take any very particular notice."

Clement Shockley, Record, pp. 39 and 40:

"Saw the place where they said he got hurt—got his foot fast. Witness tried it. The plank was split off longer than that (referring to the model produced). It came up to a point like that. Witness slipped his foot in there * * * to see how my foot would fit in it—to see if it would get fast; it did get fast. * * *

"Did not contemplate being a witness. If he had, should have taken more notice. Did not take notice particularly; did not put his foot in and try it only once. * * * Have talked the matter over with plaintiff and have undertaken to describe to him just what he (witness) saw up there; had no disagreement with him as to what it was; told him more minutely than he knew just the condition the planks were in. He thought it was not as long as witness thought it was. The split-off was not as long as witness thought it was."

Charles Ream, Record, p. 40:

"Remembered the day plaintiff was hurt; * * * went to crossing on 5th street that day and noticed a plank where there was a hole; * * * can't describe it; was

so long ago have mostly forgotten how it was; * * * can't tell how long was the hole; did not take particular notice of it; should think between seven and eight inches; do not know how wide at the east end; did not put his foot in it."

JOHN LINO, Record, p. 41:

"Q. Will you describe the place you saw there?

A. How do mean? By this block (referring to the model)?

Q. Any way you please.

A. The hole had been cut out by a car wheel. I do not think it was that wide. The car had run upon the plank and broke a piece out of it; don't seem to me that it was that wide; it might have been, though."

"Witness further testified he should judge it was a foot or eighteen inches long and about four inches wide at the east end; might have been wider; tapered off as it went west similar to that (referring to exhibit). Did not put his foot in the hole. Had been there some time; can't tell exactly how long."

JOHN YOUNG, Record, p. 42:

"Should think the hole a foot long, perhaps longer; did not take particular notice. Should judge it was four inches wide at the east end."

On the part of defendant in error two witnesses testified in the State court upon this subject, to wit, George W. Doliver and M. D. Gregg.

DOLIVER, Record, p. 55:

"Q. Just state what you discovered; never mind what was told you.

A. There was a small piece in the corner of the plank, nothing similar to that, though (referring to exhibit), where

the car had run off the switch and broke the end plank and crushed it down on the end about seven inches and about three inches wide."

GREGG, Record, p. 60:

Referring to the hole, "Should say it was from six to eight inches long."

Thus the evidence in the State court.

In the Federal court the only witnesses called by plaintiff testifying with reference to the character and size of the hole were John Lino and Jacob Kemple.

LINO, record, p. 6:

Referring to the hole, "It was about four inches wide on the east end and between a foot and eighteen inches long."

It should be noticed that this varies from his testimony in the State court only in substituting for "a foot *or* eighteen inches long" the phrase "*between* a foot *and* eighteen inches long."

KEMPLE, a witness not called in the State court or on the first trial in the Federal court, at p. 169, calling his attention to the model:

"Q. How does that compare with the hole you saw there?

A. Well, I could not exactly tell anything about the comparison with the hole, because I did not pay any particular attention to it."

Further on on same page:

Q. "Describe that hole; about how wide was it to the east end?

A. It was wide enough to get your foot in.